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A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education

Phyllis Goldfarb

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INTRODUCTION

> Modern thinking has often lost its way by separating the problem of truth from the problem of living, cognition from [the total human] situation. . . . Reflection alone will not procure self-understanding. The human situation is disclosed in the thick of living.
>
> — Abraham Heschel[1]

Should law school classes cultivate professional skills or should they advance a broad intellectual agenda? This question has remarkable staying power in ongoing debates about the crux of a legal education.[2] The form of the inquiry presumes a

1. A. HESCHEL, WHO IS MAN? 94 (1965).

2. *See, e.g.*, Barnhizer, *The University Ideal and Clinical Legal Education*, 35 N.Y.L. SCH. L. REV. 87, 92-93 (1990) ("American law schools are still caught astride a chasm that separates the Scylla of the academic university from the Charybdis of the practicing profession. . . . American law faculty have long been caught between the demands created by the seeming incompatibility of the basic visions and functions of the university and those of educating aspiring lawyers."); Janus, *Clinics and "Contextual Integration": Helping Law Students Put the Pieces Back Together Again*, 16 WM. MITCHELL L. REV. 463, 464 (1990) (describing the "non-academic," "anti-intellectual" flavor of the former curriculum chosen by William Mitchell College of Law to train practicing lawyers). *See generally* White, *The Study of Law as an Intellectual Activity*, 32 J. LEGAL EDUC. 1 (1982) (arguing that the study of law is not so much the acquisition of information as learning to "think like a lawyer"); *The Amer-*

distinction between legal theory and legal practice.

This Article concerns the relationship between theory and practice in legal academia.[3] In particular, it examines the relationship between theory and practice from the standpoint of two movements within law's academy: clinical education and feminist jurisprudence.[4] Although the former is often thought of as a practical movement,[5] and the latter a theoretical movement,[6] I hope to demonstrate the fundamental methodological similarity of the two movements, and hence, the problematic nature of the theory-practice label. Ironically, the methodological similarity of the two movements is found in their responses to the problematic nature of the theory-practice relationship.[7]

This Article also examines the ethical impulse that sparks clinical education and feminism. I suggest that each move-

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ican Bar Association's National Conference on Professional Skills and Legal Education, 19 N.M.L. REV. 1 (1989) (the primary goal of the October 1987 conference in Albuquerque was to provide a forum for law schools to discuss approaches to professional skills education). Although White's article and the symposium articles do not present stark antagonistic positions, the common perception that they are advocating different approaches is part of the problem that I am addressing here.

> 3. By "theory" we commonly mean a set of general propositions used as an explanation. Theory has to be sufficiently abstract to be relevant to more than just particularized situations. By "practice" we commonly mean the doing of something. Practice also is associated with the idea of repetition; therefore, practice sometimes is equated with the gaining of skills because one gains skills by repetition.

Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. REV. 577, 580 (1987) (footnotes omitted). For purposes of this Article, I will adopt the preliminary definitions of theory and practice offered by Professor Spiegel, although as he explains, these terms are much less distinctive than our facile use of them sometimes suggests. *Id.* at 595; *see infra* notes 60-73, 92-96 and accompanying text.

4. Frequently throughout this Article, I discuss the themes and methods of "feminism" rather than "feminist jurisprudence." The former refers to cross-disciplinary feminist thinking applicable to many fields, including law, and the latter to the specific applications of these themes and methods within the discipline of law.

5. *See, e.g.*, Ferren, *Goals, Models and Prospects for Clinical-Legal Education*, in CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE 94, 94-95 (E. Kitch ed. 1970); *see also* Spiegel, *supra* note 3, at 589-91 (the label "clinical education" suggests doing, concern with particulars rather than the general, and a focus on "practical ends rather than abstract knowledge").

6. *See, e.g.*, MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515 (1982); MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983).

7. For a general discussion of the problematic nature of the theory/practice label in legal education, see Spiegel, *supra* note 3. *See also* D. SCHON, EDUCATING THE REFLECTIVE PRACTITIONER 3-12 (1987) (exploring the link between theory and practice in various professions).

ment's perceptions of the theory-practice relationship are embedded in ethical concerns and have far-reaching ethical implications.[8] The recognition that the theory-practice relationship has profound ethical dimensions explains why a scholar and theologian such as Abraham Heschel, neither a feminist nor a clinical educator, has insights important to the feminist and clinical projects.[9]

The ethical import of the theory-practice relationship also explains why works of classical literature can contribute to an understanding of the feminist and clinical enterprises.[10] Section I of this Article begins with the reading of a text, Sophocles' *Antigone*,[11] from the perspective of each of these

8. *See infra* notes 188-95, 258-84, 317-21, 398-404 and accompanying text.

9. *See supra* note 1 and accompanying text.

10. *See* C. LARMORE, PATTERNS OF MORAL COMPLEXITY 21 (1987) ("Theory can carry us only so far in our attempt to grasp the nature of moral judgment. To go further, we must turn above all to the great works of imaginative literature."). Cora Diamond writes:

> It is part of the concept of a human being that an immense amount of what being human is for us can be present in a look that passes between two people; it is part of the concept that *all that* can equally be denied in a look. Novelists and other writers can put before us and develop our concept of a human being by giving us scenes of such recognition or denial of recognition, by showing us, reminding us, that *this* is what it is like to recognize another human being, and that *this* is what it is like to fail to accord such recognition, to refuse it. . . . The work of imaginative writers like Tolstoy or Levi illuminates for us the concept of a human being and at the same time can elaborate and deepen it. . . . [G]rasping a concept (even one like that of a human being. . .) is not a matter just of knowing how to group things under that concept; it is being able to participate in life-with-the-concept . . . . To be able to use the concept "human being" is to be able to think about human life and what happens in it.

Diamond, *Losing Your Concepts*, 98 ETHICS 255, 264-66 (1988) (emphasis in original).

Drucilla Cornell suggests that Diamond's observation is particularly true for the concept of "woman," due to the untenable position of women in a world of gender hierarchy. *See* Cornell, *The Doubly-Prized World: Myth, Allegory and the Feminine*, 75 CORNELL L. REV. 644 (1990). Drawing from a passage in Emily Bronte's journal — "this world is hopeless without, the world I doubly prize" — Cornell implores feminists to look to myths and allegories in developing an "ethical feminism." *Id.* at 645. In her words

> the world "stranger than the facts". . . opens us to the possibility of a new choreography of sexual difference, through an allegorical account of the Feminine as beyond any of our current stereotypes of Woman. We also need to prize the Feminine, in and for itself, through the retelling of the myths of the Feminine as an imaginative universal. Both myth and allegory are necessary, indeed unavoidable, in feminist theory.

Id.

11. SOPHOCLES, *Antigone*, in THE THEBAN PLAYS 126 (E.F. Watling trans. 1962).

intellectual movements. Which aspects of this Greek drama draw a feminist thinker's particular attention? To which aspects would a legal clinician pay special notice? The responses to these questions are obviously different. A feminist's reading would center on issues of gender; the focus of a clinician's reading is not immediately apparent.

Despite this difference, I have chosen to begin in this fashion in order to test — or more accurately, because I will declare the outcome of the test, to demonstrate — my claim of methodological similarity between the two movements. If the two have similarity, their approach to a situation in context will likely reveal it. I have chosen the text of *Antigone* as the context, in preference to a hypothetical constructed specifically for my purposes, because of its likely familiarity,[12] its rich interpretive landscape, its ethical significance, and its ultimate epistemological message which foreshadows the themes of this Article.[13] I have also chosen it because of the powerful human conflict it describes. If the methods of feminism and clinical education are sound — that is, if they have breadth and depth — they will apply to any human conflict, not just human conflicts ordained as legal conflicts. Moreover, if the medium is at least part of the message, then delving deeply into a particular context to extract and examine a more general idea is an appropriate way to manifest my primary contention: that the two readings converge in their shared challenge to the popular understanding of theory and practice as separate undertakings.

Following the readings of *Antigone*, I explore possible reasons for the methodological relationship between clinical legal education and feminist jurisprudence. But relationship does not mean identity. Although each set of methods is compatible, the movements have worked independently, not collaboratively. Accordingly, the sets of methods contain variations, and each movement uses distinct terminology to describe and justify its methods. Section II examines more specifically the respective ways that feminist and clinical educators describe and justify their choice of methods. Section III surveys the similarities and the differences between the methodologies of the two movements. This leads, in Section IV, to an analysis of the implications for clinical education if it drew more explicitly from feminist methods, the implications for feminist jurisprudence if

12. One commentator claims that the number of versions of the frequently told story is beyond inventory. G. STEINER, ANTIGONES 199 (1984).

13. *See infra* notes 69-72 and accompanying text.

it drew more explicitly from clinical methods, and the implications for legal education if it drew more explicitly from each. Section IV concludes with an exploration of how recasting our understanding of the theory-practice relationship also recasts our understanding of ethics and ethical inquiry.

All of the methods described in this Article have an idealized ring. I have done this deliberately, for even if these methods, when implemented, sometimes diverge from the versions delineated in my text, these versions accurately describe the methods as designed and intended. Moreover, the idealized understandings constitute the ever-present aspirations against which feminists and clinical educators measure the sometimes deficient reality. In this sense, the aspirational descriptions represent the truest single account of these sets of methods that I could supply.[14]

My motives in examining the methodological linkages of feminism and clinical education are, in part, personal. This writing project has helped me, as someone involved in both fields, to repair some of the fragmenting of my intellectual energy and to improve my sense of professional integration.[15] Perhaps reading this may do so for others,[16] and I encourage

14. *See* White, *Doctrine in a Vacuum: Reflections on What a Law School Ought (And Ought Not) To Be*, 36 J. LEGAL EDUC. 155, 156 (1986) (explaining how caricatures of legal education set up common expectations and are therefore "real").

15. I was tempted to use Kimberle Crenshaw's language of "intersectionality" to describe the integration of the parts of myself devoted to feminism and clinical education. *See* Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 CHI. LEGAL F. 139. I have resisted the temptation because I have concluded that use of her language would constitute an appropriation, in a pejorative sense of the term. Crenshaw has deployed the word "intersectionality" to describe strategies for culturally recognizing the inseparability of race and gender in the experience of black women. The culture's insistence on treating race and gender separately, including the legal culture's insistence on distinguishing claims of race and gender discrimination, generates intersectionality problems of a more fundamental variety and a far greater magnitude than those created for me by the cultural separation of feminism and clinical education.

Moreover, my application of Crenshaw's terminology to my dramatically different situation would imply that what is useful about other people's concepts is how they illuminate our own situations, rather than how they illuminate theirs. This is a dangerous and regressive message, replicating the myopia that gave rise to the need for new concepts. Not only have I resisted the temptation to borrow Crenshaw's term, I have also resisted the temptation to delete this footnote, because these thoughts may be instructive to others concerned about issues of appropriation.

16. According to Professor Emma Coleman Jordan, 40% of clinical law

these readers to further discussion by altering or elaborating the ideas proposed here.

I wish to precipitate discussion of how feminism and clinical education might draw more directly on the strengths of the other, because I suspect that such cross-fertilization would enhance the quality and contribution of each. Even more fondly, I wish to urge law schools to draw more directly on the strengths of both, for I believe that doing so would invigorate legal education. Furthermore, I believe that incorporating the lessons of feminism and clinical education into the law school curriculum would enrich the study of ethics and would help bring ethical reflection into the center of lawyers' everyday activities.

Because feminists and clinical educators recognize the interlacing of theory and practice, they view this Article's opening question — whether law school classes should cultivate professional skills or advance a broad intellectual agenda — as an unintelligible inquiry. An explicit recognition of the theory-practice relationship by all legal educators would shift their focus to the inquiry that preoccupies clinical and feminist legal educators: how can legal education more effectively illuminate the ethical dimensions of daily life and work, and how can it better inculcate in students a sense of moral responsibility for professional and personal choices? The pervasiveness of injustice in our world, and the power of lawyers to aggravate or alleviate it, makes this an urgent inquiry. I hope this Article

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teachers are women. E. Jordan, Appointments, Promotion, and Tenure: Shadow Tracks and Obstacle Courses 5, materials prepared for The Voices of Women: A Conference of Women in Legal Education (Apr. 21, 1990) (unpublished conference materials on file with author). Prominent among women identified at least to some extent with both feminism and clinical legal education are Professors Jane Aiken, Katharine Bartlett, Karen Czapanskiy, Mary Jo Eyster, Naomi Kahn, Lisa Lehrmann, Carrie Menkel-Meadow, Nancy Polikoff, Susan Ross, Suellyn Scarnecchia, Elizabeth Schneider, Ann Shalleck, Louise Trubeck, and Lucie White, although there are many others as well. At the law schools of Georgetown University and American University respectively, Professors Ross and Shalleck direct clinics that focus on the relationship of women to law.

Louise Trubeck has reminded me of the problem of "serial marginalization." Feminists and clinicians in legal education may choose not to work together, and professors may choose not to be identified with both movements, in order to avoid being doubly marginalized. Letter from Louise G. Trubeck to author (Dec. 5, 1991) (on file with author). For a discussion of the similar problems of marginalization faced by each movement, see *supra* notes 76-91 and accompanying text. My contention here is that dialogue between both movements, as well as dual loyalties, would strengthen each voice. Sections IV. A. and IV. B., respectively, develop these contentions.

represents a step toward encouraging all legal educators to acknowledge and address this crucial question.

I. READING *ANTIGONE*

> The universe is made of stories, not of atoms.
>
> — Muriel Rukeyser[17]

Sophocles' *Antigone* opens in the midst of crisis.[18] Antigone and her older sister Ismene have suffered the loss of their brothers, Polynices and Eteocles, who have killed one another while fighting for the throne of Thebes.[19] Having assumed the throne, their uncle Creon has issued an edict declaring that Eteocles, the ruler whom the Theban people had favored, would be given an honorable state funeral, while Polynices, who had returned from expulsion to forcibly seize the throne, would be denied all last rites.[20] The edict forbade anyone to

17. M. RUKEYSER, *The Speed of Darkness*, in THE COLLECTED POEMS OF MURIEL RUKEYSER 486 (1978).

18. The events that triggered the crisis have transpired in the two previous plays: *King Oedipus* and *Oedipus at Colonus*. Antigone is the third play of the trilogy. Antigone and her siblings are the children of Oedipus, King of Thebes until his banishment.

19. SOPHOCLES, *supra* note 11, at 126-27; *see also* Ismene's description of her brothers' deaths:

> And now our brothers, both in a single day
> Fallen in an awful exaction of death for death,
> Blood for blood, each slain by the other's hand.

Id. at 128.

20. Creon justifies his edict in the following fashion:

> No man who is his country's enemy
> Shall call himself my friend. Of this I am sure —
> Our country is our life; only when she
> Rides safely, have we any friends at all.
> Such is my policy for our common weal.
> In pursuance of this, I have made a proclamation
> Concerning the sons of Oedipus, as follows:
> Eteocles, who fell fighting in defence of the city,
> Fighting gallantly, is to be honoured with burial
> And with all the rites due to the noble dead.
> The other — you know whom I mean — his brother Polynices,
> Who came back from exile intending to burn and destroy
> His fatherland and the gods of his fatherland,
> To drink the blood of his kin, to make them slaves —
> He is to have no grave, no burial,
> No mourning from anyone; it is forbidden.
> He is to be left unburied, left to be eaten
> By dogs and vultures, a horror for all to see.
> I am determined that never, if I can help it,
> Shall evil triumph over good. Alive
> Or dead, the faithful servant of his country
> Shall be rewarded.

Id. at 131-32. Antigone protests the edict when she reports to Ismene:

bury Polynices on pain of death.[21]

As the curtain lifts, Antigone is informing Ismene that she has decided to defy Creon's edict.[22] In a previous conversation in which Antigone had tried in vain to dissuade Polynices from doing battle,[23] Polynices had asked his sisters to bury him when

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O Ismene, what do you think? Our two dear brothers . . .
Creon has given funeral honours to one,
And not to the other; nothing but shame and ignominy.
Eteocles has been buried, they tell me, in state,
With all honourable observances due to the dead.
But Polynices, just as unhappily fallen — the order
Says he is not to be buried, not to be mourned;
To be left unburied, unwept, a feast of flesh
For keen-eyed carrion birds. The noble Creon!

Id. at 127.

21. In Antigone's words:

It is against you and me [Creon] has made this order.
Yes, against me. And soon he will be here himself
To make it plain to those that have not heard it,
And to enforce it. This is no idle threat;
The punishment for disobedience is death by stoning.

Id.

22. *Id.* at 126-28.

23. Antigone: O Polynices,
Do this one thing for me.
Polynices: What, dear Antigone?
Antigone: Order your army back to Argos; now,
Before it is too late, to save yourself
And our city from destruction.
Polynices: That is impossible.
If I cry off this time, how can I ever
Lead them to battle again?
Antigone: Again? But why?
Why need you fight again? What use is it
To make your home a ruin?
Polynices: Am I to endure
The insult of exile, and the mockery of a younger brother?
. . . .
Antigone: O my brother!
Polynices: Don't weep for me.
Antigone: What can I do but weep,
Seeing you go like this to certain death?
Polynices: If certain, I must meet it.
Antigone: Is there no other?
Polynices: No other way that's right.
Antigone: I cannot bear it!
To lose you!
Polynices: That must be as Fate decides.
Well . . . May the gods be good to you. God knows
You have deserved it.

SOPHOCLES, *Oedipus at Colonus*, in THE THEBAN PLAYS 71, 114-15 (E.F. Watling trans. 1962).

he met his death.[24] Antigone now declares that her obligation lies with her dead brother and with the holiest laws of the gods which impose an obligation to bury one's deceased kin,[25] not with the law of the king.[26] Frightened by Antigone's defiance, Ismene insists that because they are only women, they are too weak to resist men and the state.[27] When Ismene refuses to assist Antigone in defying the decree, informing her that she is "bound to fail,"[28] Antigone speaks harshly to her.[29] Ismene responds by assuring Antigone that she loves her.[30]

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24. For the first time since the banishment of Oedipus from Thebes, Polynices visits his father, who is accompanied by Ismene and Antigone, to seek the patronage of Oedipus for Polynices' assault on Thebes to seize the throne. *Id.* at 110-11. Not only does Oedipus refuse to give his blessing to the revolt, blaming Polynices and Eteocles for allowing his banishment, but he prophesies both their deaths in the battle. *Id.* at 112-13. Upon hearing the prophecy, Polynices beseeches his sisters to honor him in his death, just as they have served their father in his exile:

> But O my sisters, if all these pitiless curses
> Which you have heard, fulfil themselves in act,
> And if you ever come again to Thebes,
> By all the gods, remember me with kindness.
> Give me a grave, and reverent offices.
> So to the commendation which you earn
> For faithful service here, more may be added
> By what you do for me.

Id. at 114.

25. *See* M. NUSSBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY 55, 66, 437 n.14 (1986) (describing the classical Greeks' familial and religious obligations to bury the dead, and explaining that the obligation is altered, though not avoided, when one's kin is a traitor).

26. I will bury my brother;
> And if I die for it, what happiness!
> Convicted of reverence — I shall be content
> To lie beside a brother whom I love.
> We have only a little time to please the living,
> But all eternity to love the dead.
> There I shall lie for ever. Live, if you will;
> Live, and defy the holiest laws of heaven.

SOPHOCLES, *supra* note 11, at 128.

27. O think, Antigone; we are women; it is not for us
> To fight against men; our rulers are stronger than we,
> And we must obey in this, or in worse than this.
> May the dead forgive me, I can do no other
> But as I am commanded; to do more is madness.
> . . . I cannot act
> Against the State. I am not strong enough.

Id.

28. *Id.* at 129.

29. *Id.* ("Oh, I shall hate you if you talk like that!").

30. *Id.* ("Go then, if you are determined, to your folly. But remember that those who love you . . . love you still."). As Martha Nussbaum notes, Ismene appears to be motivated by genuinely felt emotions, Antigone by a deeply held sense of duty. M. NUSSBAUM, *supra* note 25, at 64. Antigone's motivation is

This conversation shapes *Antigone*'s central conflict, and the drama unfolds towards its somber conclusion. Among its many themes, the play seeks to unravel the complex relationship between law and morality. This philosophical inquiry is captured in the struggles of its characters. Antigone elevates her religious responsibility to her deceased brother over her responsibility to obey the law. Polynices' rejection of Antigone's pleas that he not go to war has not affected the primacy of her responsibility to their relationship.[31] This choice is consistent with her previous behavior in insisting on the primacy over her own life of her responsibility to her relationship with her exiled father Oedipus,[32] whom she had cared for until his death.[33] In contrast stands Creon's insistence until near the play's end that his duty to consistently apply law and policy outweighed his familial relationships with Polynices or Antigone.[34]

A. A FEMINIST'S READING

A feminist reader of *Antigone* might note that, although only Ismene explicitly evokes gender to support her stance, tying her refusal to resist the state to her womanhood,[35] the gen-

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not inconsistent with that of several female respondents in Carol Gilligan's moral development research. C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL DEVELOPMENT AND MORAL THEORY (1982). These respondents located the moral injunction to act not so much in their feelings for others, but in their awareness of others' need. *Id.* at 54.

31. *See supra* note 23.

32. Oedipus blinded himself following the suicide of his wife Jocasta. The discovery that Oedipus had unwittingly killed his father and married his mother provoked these acts. SOPHOCLES, *King Oedipus*, in THE THEBAN PLAYS 25, 60-61 (E.F. Watling trans. 1962). Antigone, like her brothers and sister, was both the child of Oedipus and his sibling.

33. Oedipus dies near the end of *Oedipus at Colonus*. No longer needed to care for him in exile, Antigone and Ismene return to Thebes. *See* SOPHOCLES, *supra* note 23, at 124.

34. Creon relents only when the blind prophet Teiresias informs him that his own son Haemon, Antigone's betrothed, would die in return for Creon's refusal to arrange the burial of Polynices and for ordering Antigone to be sealed in a cave where she would slowly die. SOPHOCLES, *supra* note 11, at 154-55. Creon then reverses himself, burying Polynices and ordering Antigone's release, but his reversal comes too late to avert further tragedy. *Id.* at 155. Antigone has already hung herself in the cave and Haemon, upon finding her body, has stabbed himself. *Id.* at 159. Creon's wife, Eurydice, also commits suicide upon learning of Haemon's death. *Id.* at 160. Creon blames his "stubborn will" for causing the deaths of his wife and son. *Id.*

35. *See supra* note 27. Although Creon does not tie his stance directly to his gender, he does express gender-conscious views. For example:

> Therefore, I hold to the law,
> And will never betray it — least of all for a woman.

ders of the other characters are more than incidental features. In staking out their positions, Antigone and Creon are evocative of Amy and Jake, the eleven-year-old representatives of the two distinct modes of moral reasoning explored by Carol Gilligan in *In a Different Voice*:[36] a morality based on responsibility and care in relationships versus a morality based on a logical hierarchy of rights and principles.[37] Through Amy and Jake, Gilligan sought to demonstrate that in a world where males and females are socialized differently, and arrive at adulthood with different interpersonal orientations and a different set of social experiences, gender can influence the process of moral reasoning.[38]

Gilligan sees different partial truths in these different moral ideologies and recognizes a need for dialogue between them.[39] *Antigone* supports Gilligan's view by revealing the disastrous folly of both Creon's and Antigone's rigid morality, displayed in their mutual refusal to consider the merits of each other's position.[40] At the same time, however, the play chal-

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Better be beaten, if need be, by a man,
Than let a woman get the better of us.

SOPHOCLES, *supra* note 11, at 144.

36. *See* C. GILLIGAN, *supra* note 30.

37. *Id.* at ch. 2. The citation to Gilligan's work brings with it a virtually obligatory footnote to the feminist criticisms of her work, which, by now, are legion. These criticisms focus primarily on Gilligan's inattentiveness to categories of race and class, and her disregard of the historical, social, and political context of the development and use of the ethic of care. *See generally* Kerber, Greeno & Maccoby, Luria, Stack & Gilligan, *On* In A Different Voice: *An Interdisciplinary Forum*, 11 SIGNS 304 (1986) (a "cross-disciplinary dialogue" on Gilligan's work); Nails, *Social-Scientific Sexism: Gilligan's Mismeasure of Man*, 50 SOC. RES. 643 (1983) (criticizing Gilligan for her generalizations and suggesting that such generalizations may very likely be used as evidence that women are inferior); Walker, *In a Diffident Voice: Cryptoseparatist Analysis of Female Moral Development*, 50 SOC. RES. 665 (1983) (arguing that accepting Gilligan's conclusions will lead to the continued oppression of women).

Despite these criticisms, the analogy to Amy and Jake as representatives of two distinct modes of moral reasoning is too apt for my purposes to ignore. Antigone and Creon certainly represented two distinct modes of moral reasoning. Antigone, like Amy, focused on her obligations in relationships, and Creon, like Jake, on abstract moral principles.

38. C. GILLIGAN, *supra* note 30, at 11. Although Gilligan says that the association of different voices with gender is not absolute, *id.* at 2, she speaks throughout the book as if the alternative voice she describes was, indeed, a woman's voice. *See* Broughton, *Women's Rationality and Men's Virtues: A Critique of Gender Dualism in Gilligan's Theory of Moral Development*, 50 SOC. RES. 597, 600-03 (1983).

39. *See* C. GILLIGAN, *supra* note 30, at 165, 167.

40. Nussbaum joins in this interpretation of *Antigone*. *See* M. NUSSBAUM, *supra* note 25, at 65-66. Such an interpretation dovetails with the view of trag-

lenges the possibility of transforming moral discourse by including both voices when the power to declare truth is so unevenly distributed. Because Creon commanded the force of law, his truth could officially annihilate Antigone's truth, casting it as deviant and dangerous.[41] If not for the depths of tragedy that befell his family, Creon was unlikely to have recognized the partiality of his view.[42] *Antigone*, then, underscores the reasons that feminists value double vision: they acknowledge the need for genuine dialogue across differences while remaining sharply cognizant of the societal structures that impede its accomplishment.[43]

A feminist reader might also note that although, as a woman, Antigone was an outsider to the political machinations of her male relatives,[44] the course of her life was determined by her male relatives, particularly by their moral choices. In *King*

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edy as a refusal of the mutual acknowledgment that humans must have to thrive. *See* S. CAVELL, *The Avoidance of Love: A Reading of King Lear*, in MUST WE MEAN WHAT WE SAY? 267 (1976), *cited in* Minow, *The Supreme Court, 1986 Term — Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987); *see also* Cornell, *The Poststructuralist Challenge to the Ideal of Community*, 8 CARDOZO L. REV. 989, 1018 (1987) ("The danger of certainty is that it turns against the generous impulse to open oneself up to the other, and to truly listen, to risk the chance that we might be wrong.").

41. As Catharine MacKinnon has stated: "Power is socially constructed such that if Jake simply chooses not to listen to Amy, he wins; but if Amy simply chooses not to listen to Jake, she loses. In other words, Jake still wins because that is the system." MacKinnon, *Feminist Discourse, Moral Values and the Law — A Conversation*, 34 BUFFALO L. REV. 11, 74 (1985). Likewise, Virginia Woolf has observed that while the values of men and women differ, "it is the masculine values that prevail." V. WOOLF, A ROOM OF ONE'S OWN 77 (1963); *see also* K. FERGUSON, THE FEMINIST CASE AGAINST BUREAUCRACY 169-70 (1984) (criticizing Gilligan's failure to discuss the extent to which the inclusion of both voices depends on political struggle).

MacKinnon's critique is even sharper. She resists calling the alternative voice a woman's voice because "his foot is on her throat." MacKinnon, *supra*, at 74-75. The alternative voice is the voice of the powerless under conditions of inequality, MacKinnon believes, and we do not know how a woman would speak under conditions of equality. *Id.*; *see also* C. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 51, 52 (1989) (elaborating this contention).

42. For a description of how crisis can precipitate developmental growth, see generally R. COLES, CHILDREN OF CRISIS (1964).

43. For a discussion of related observations focused more specifically on minorities, see Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7 (1989).

44. The cultural views of Antigone's male relatives, Creon's in particular, helped to keep Antigone and Ismene as outsiders to politics by defining their appropriate place as inside the home. In Creon's words:

> Take them, and keep them within —
> The proper place for women.

SOPHOCLES, *supra* note 11, at 142.

Oedipus,[45] the first play of the Sophocles trilogy, Antigone's fate is set in motion by Oedipus' violence — his slaying of a man after a quarrel,[46] and his self-mutilation, resulting in blindness, on the discovery of his father's and mother's true identity (his father the man he had slain, his mother the mother of his children)[47] — Creon's banishment of Oedipus for his unintended offenses of incest and patricide,[48] and Antigone's brothers' approval of their father's banishment stirred by their desire for the throne.[49] These acts lead Antigone to sacrifice her own needs and desires[50] to care for her father as he wanders in exile,[51] shunned by all who learn his identity.[52] Later, her brothers' violence against one another[53] provokes Creon's edict against Polynices' burial[54] which, in turn, leads to her disobedience of the edict,[55] and inevitably to Creon's violence when he orders her death as the price of her disobedience.[56]

Lacking the political or social power exercised at various times by the men in her family, but directly affected by the manner in which they exercised their power, Antigone's experience of the state was undoubtedly different from that of her father, uncle, and brothers.[57] Although she chose her course of

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45. SOPHOCLES, *supra* note 32.

46. *Id.* at 48.

47. *Id.* at 60-61.

48. *Id.* at 68.

49. SOPHOCLES, *supra* note 23, at 112-13.

50. Gilligan examines conventions of female self-abnegation and self-sacrifice as part of the ethic of care for others. C. GILLIGAN, *supra* note 30, ch. 3. In Gilligan's view, self-development requires considering one's own needs as part of moral deliberation, not just the needs of others. *Id.* at 85, 122, 129, 149.

51. SOPHOCLES, *supra* note 23, at 71-75.

52. *Id.* at 78.

53. SOPHOCLES, *supra* note 11, at 124-27.

54. *See supra* note 20 and accompanying text.

55. *See supra* note 22 and accompanying text.

56. SOPHOCLES, *supra* note 11, at 147. Unfortunately, variations of the plot of *Antigone* are still being reenacted. For example, in Ramirez Rivas v. INS, 899 F.2d 864 (9th Cir. 1990), the court found that a Salvadoran woman seeking asylum in the United States had a well-founded fear of death despite her absence of political involvement because she had, among other things, visited her male relatives, who were guerillas, in prison. An expert testified that Salvadoran security forces, or "death squads," maintain prison visitation lists. *Id.* at 866. I am grateful to Deborah Anker for calling my attention to this case.

57. *See* Elshtain, *Antigone's Daughters*, in FREEDOM, FEMINISM AND THE STATE 61 (W. McElroy ed. 1982), stating that:

> The question of female identity and the state looks very different if one picks up the thread of woman's relationship to public power

action pre-reflectively, had she elaborated the moral reasoning process by which she confronted her perceived legal, filial, and religious responsibilities,[58] she might have asked herself a version of the questions Catharine MacKinnon asks in her recent book, *Toward A Feminist Theory of the State*:

> What is state power? Where, socially, does it come from? How do women [in my situation and in other situations] encounter it? What is the law for women [in my situation and in others]? How does law work to legitimate the state, [privileged] male power, itself? Can it do anything for women [in my situation and in others]? Can it do anything about . . . [the] status [of women in my situation and in others]? Does how the law is used matter?[59]

> from the standpoint of an Antigone; if one adopts the sanctioned viewpoint of the handful of thinkers whose works comprise the canon of the Western political tradition; or if one tells the tale through the prism of unchecked *realpolitik*, from astride the horse of the warrior, or from the throne of the ruler.

Id. at 70 (emphasis in original). Elshtain suggests that women adopt "social feminism," the standpoint of Antigone, viewing the concrete and particular world of everyday reality from their traditional social location rather than adopting the impersonal, abstract, bureaucratic standards that constitute the "ways of acting of the powerful." *Id.* at 67-68. Her prescription is for a way of acting in the world that challenges the authority of the state to override deeply rooted human values such as family, loyalty, and community, *id.* at 69, serving as a reminder, like Antigone, of the real human impact of public policies, *id.* at 75. David Barnhizer might call this social location one of "speaking truth to power." *See* Barnhizer, *The University Ideal and the American Law School*, 42 RUTGERS L. REV. 109, 113 (1989).

Other writers from groups who lack political and social power have described the influence of their societal position on their perceptions and experiences of state power. *See, e.g.*, Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989) (explaining the source and strength of the conviction on the part of many African-Americans that courts and other social institutions are biased and unfair).

58. According to Nussbaum, Antigone held so rigidly to an overly simplified set of views that she was unlikely to engage in reflective moral reasoning. M. NUSSBAUM, *supra* note 25, at 63. For example, Nussbaum views Antigone's refusal to see any moral distinction between the brother who died protecting Thebes and the brother who died attacking it as a decision not to take seriously the values of others in considering her own perspective. *Id.* at 63-64.

Elshtain, on the other hand, seems to interpret Antigone's reflective character more generously when she holds Antigone up as a model. She views Antigone as the guardian of deeply significant values against the arrogance of power. *See* Elshtain, *supra* note 57, at 70-71. If one views Antigone as a metaphor for defending one's unassailable bedrock commitments rather than as a character who rigidly refuses to examine her commitments, then Elshtain's proposition becomes more appealing.

59. C. MACKINNON, *supra* note 41, at 159. I have modified MacKinnon's questions because her phrasing implies that all women are similarly situated with respect to the social power of the state. This is false because many women also experience inequality due to their race, class, sexual orientation, or bodily condition, changing the forms of the inequality that they experience on

Thinkers addressing questions such as these are developing a feminist theory of the state that "comprehend[s] how law works as a form of state power in a social context in which power is gendered."[60]

Antigone, or any number of other lived or vicariously lived situations, readily provide the impetus for such a theoretical project. Feminist theorizing begins with the concrete experiences of particular women, such as Antigone, whose situations crystallize the relationship of their needs and interests as they view them to state authority as they encounter it. These experiences are then questioned, probed, examined, explored, and analyzed, a process that produces tentative theoretical conceptions. Once formulated, these theories are continually held up to the light of new experiences for evaluation, refinement, modification, and development.[61] In short, feminist thinkers view concrete situations as containing strong theoretical potentialities. Theory then circles back to guide future behavioral choices which, in turn, test and reshape theory. This method of analysis is an essential feature of feminism.[62]

Elaborating a comprehensive feminist analysis of *Antigone* is a project far larger than intended or necessary here.[63] Rather, my intention is simply to illuminate aspects of *Antigone* to which a feminist reader might specially attend and describe how she might attend to them. I have done so for purposes of comparison with the reading that follows.

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the basis of gender. For a critique of MacKinnon's implicit and explicit claims as to the unitary position of all women, see Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

Antigone is not well-positioned, unless she seeks out stories of and information about a diverse group of women, to help in the development of multiple theories that express the vantage points on state power of women situated in different socializing categories. MacKinnon's questions, however, are useful to Antigone when they are particularized to account for women's heterogeneity.

60. *See* C. MACKINNON, *supra* note 41, at 159; *see also id.* at 114 ("If the sexes are unequal, and perspective participates in situation, there is no ungendered reality or ungendered perspective.").

61. For a contextual description of how this process works, see Schneider, *The Dialectics of Rights and Politics: Perspectives From the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986).

62. For an elaboration of feminist methods, see *infra* Section II. A.

63. Of the many interpretations of *Antigone*, one that examines gender roles is C. SEGAL, TRAGEDY AND CIVILIZATION: AN INTERPRETATION OF SOPHOCLES (1981). *See also* Elshtain, *supra* note 57. A comprehensive feminist analysis of *Antigone* would also examine the effect of Sophocles' gender identity on his depiction of characters and events in the play.

B. A CLINICIAN'S READING

Examining whether a clinical educator would bring any special perspective to a reading of *Antigone* is an effort less obvious than the above. Legal clinicians, having drawn in the past on a variety of theoretical foundations for their work,[64] are likely to have a more diffused focus than feminist readers focused on gender. Nevertheless, clinicians might find in *Antigone* a justification of clinical methods. They might compare the possibilities for insight immanent in study and deliberation alone with the possibilities for insight immanent in Antigone's situation.

Some teachers are drawn to clinical settings due to a deeply-held belief that experiencing a conflict between one's personal morality and a prescription of law or law practice provides a bone-deep entryway into exploring the relationship between law and morality, or constructing a theory of state power and how it operates.[65] Confronting such a situation, clinicians believe, brings the values at stake and the potential consequences of various courses of action into sharp relief. Thus, a person facing an actual conflict is more likely to notice and contemplate the breadth and depth of the concrete consequences that may flow from the situation. Experience strengthens the motivation for inquiry, enlivens the critical issues, and provides a sound basis for examination and analysis.[66] Theory forged in experience is likely to be thick and rich, and to relate directly to the important features of that experience. In other words, clinical education is rooted in the notion that theory formed through a clinical process is more likely to be useful and more likely to be right.[67]

The stories underlying the cases that find their way into law school clinics may resemble Greek tragedies: their characters confronting trying circumstances and behaving wisely or

64. For a typology of lawyering theories, drawn from sociology, psychology, anthropology and philosophy, that clinical educators have developed and applied, see Menkel-Meadow, *The Legacy of Clinical Education: Theories about Lawyering*, 29 CLEV. ST. L. REV. 555 (1980).

65. *See, e.g.*, Condlin, *"Tastes Great, Less Filling": The Law School Clinic and Political Critique*, 36 J. LEGAL EDUC. 45, 66-67 (1986).

66. *See, e.g.*, Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology*, in CLINICAL EDUCATION FOR THE LAW STUDENT 374, 383-84 (1973).

67. *See, e.g.*, M. NUSSBAUM, *supra* note 25, at 69 ("[C]orrect choice (or good interpretation) is, first and foremost, a matter of keenness and flexibility of perception, rather than of conformity to a set of simplifying principles.").

foolishly, nobly or ignobly. The complexity, richness, and texture of these cases do not easily lend themselves to simply stated understandings or moral summaries. Clinic students, as well as clients, may find themselves standing in Antigone's position, experiencing distaste, perhaps even a powerful visceral resistance, toward the prescribed form or custom of law practice. They may also find themselves standing in Creon's position, uncritically accepting the practices of law without attention to consequences. Alternatively, they may feel, like Ismene, a deep ambivalence about their personal and civic responsibilities. The value of clinical methods depends on using Antigone's, Creon's, Ismene's, and others' standpoints as starting points for inquiry.

A clinician might observe that Antigone's starting point was all too literally her ending point as well. Antigone had neither the inclination nor the opportunity to examine her experience, both internal and external, to consider the full range of alternative courses of action available, to assess carefully the competing perspectives implicated in her situation, and then to elaborate the principles that would guide her. On the other hand, Creon's simple starting theories are dramatically altered by the play's end. Reflection on his tragic experiences leads Creon to reconsider the principles of living that he once firmly held and to recognize a "more complicated deliberative world."[68] This interaction between theory and experience, enabled by conscientious reflective practices, is the epistemological model that animates clinical education.

Ultimately the play *Antigone* supports such an epistemology. Had Antigone adopted such a model, or had Creon adopted it sooner, perhaps tragedy could have been averted. As Martha Nussbaum observes, the play is "unusually full of words for deliberation, reasoning, knowledge and vision,"[69] equating flexibility with good deliberation,[70] and concluding

68. *See id.* at 60. Nussbaum states that Creon is "determined to conceal from deliberative view the claims of both familial and affective ties, at least insofar as they clash with civic interest." *Id.* at 57. He makes "all values commensurable in terms of a single coin." *Id.* at 58. Ultimately, his "love for his dead son, a love that can no longer be either denied or accommodated within the framework of the civic theory of the good, forces him to reject this theory." *Id.* at 62. Creon regrets that the narrowness of his deliberations "left things of genuine worth on the outside." *Id.*

69. *See id.* at 51.

70. As Haemon urges his father:

Let not your first thought be your only thought.
Think if there cannot be some other way.

with the assertion that wisdom is the most important component of happiness.[71] Creon learns a hard-won lesson about "changing one's vision of the world, about losing one's grip on what looked like secure truth and learning a more elusive kind of wisdom."[72] *Antigone*, then, subtly advocates a process of continuous attention to, and reflection on, the particularities of a situation as the route to the interpretations and reinterpretations that are the source of wisdom. This theme embodies a clinical perspective on the role of concrete experiences and practices in the process of making and remaking theory.

C. WHY THE READINGS CONVERGE

Despite differences in content, both the feminist and clinical readings adopt a similar approach to the theoretical enterprise. Both feminist theorists and clinical educators see experiences like Antigone's and Creon's as containing, among other things, powerful theoretical possibilities. Both movements also see theory as containing powerful practical possibilities for informing future behavior and experience. This ongoing feedback relationship suggests that what has appeared dichotomous is actually dialectic. The theory-practice split is really a theory-practice spiral.

Clearly, clinical education and feminist theory demonstrate not the inherent separation between theory and practice, but the eternal interplay of good theory and good practice. In fact, clinicians and feminists share concerns about the soundness of theory uninformed by, and untested in, the bright light of the real-world, as well as the soundness of practice unshaped by, and unattached to, the firm roots of consciously-developed theory.[73]

Surely, to think your own the only wisdom,
And yours the only word, the only will,
Betrays a shallow spirit, an empty heart.
It is no weakness for the wisest man
To learn when he is wrong, know when to yield.
So, on the margin of a flooded river
Trees bending to the torrent live unbroken,
While those that strain against it are snapped off.

SOPHOCLES, *supra* note 11, at 145.

71. Of happiness the crown
And chiefest part
Is wisdom . . .

Id. at 162.

72. M. NUSSBAUM, *supra* note 25, at 52.

73. *See supra* text accompanying notes 61-62, 66-67. Robert Coles explains that the word "theory" derives from the Greek root *theamai*, meaning "I be-

Is the feminist theorists' and the clinical educators' shared stance toward the theory-practice relationship simply a matter of happenstance? Does their similarity flow from a scenario in which two movements following distinctly different courses accidentally cross paths on their way to scattered destinations? Surely, accident is a more likely explanation than appropriation.[74] Appropriation requires conscious borrowing. Given the dearth of literature applying feminist theory to clinical education, or vice versa, such a deliberate exchange appears relatively implausible as an explanation.[75]

I would locate the source of the similarity somewhere between conscious appropriation and casual accident. Although I have not detected sufficient prior borrowing by either movement from the other to frame a shared approach to the theory-practice spiral,[76] I have found sufficient similarity in the historical status of clinical education and the historical status of women to account for their independent arrivals at the same view of the theory-practice relationship. Stated simply, the status of clinical education in law schools is not unlike the status of women in society. Although many perceive both as making a special and essential contribution to the collective enterprise, each

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hold." He asserts that this derivation expresses a view of theory as "an enlargement of observation." R. COLES, THE CALL OF STORIES 20 (1989).

74. Edward Said describes the manner in which ideas "travel":

> Like people and schools of criticism, ideas and theories travel — from person to person, from situation to situation, from one period to another. Cultural and intellectual life are usually nourished and often sustained by this circulation of ideas, and whether it takes the form of acknowledged or unconscious influence, creative borrowing, or wholesale appropriation, the movement of ideas and theories from one place to another is both a fact of life and a usefully enabling condition of intellectual activity.

E. SAID, *Traveling Theory*, in THE WORLD, THE TEXT, AND THE CRITIC 226 (1983).

75. I have located one article that centers an analysis of the marginality of clinical education on its association with the characteristics of women. Tushnet, *Scenes from the Metropolitan Underground: A Critical Perspective on the Status of Clinical Education*, 52 GEO. WASH. L. REV. 272 (1984). Although some authors have noted the relationship between feminism and clinical education, *see, e.g.*, Menkel-Meadow, *Durkheimian Epiphanies and the Importance of Engaged Social Science in Legal Studies*, 18 FLA. ST. U.L. REV. 91, 106-08 (1990) [hereinafter Menkel-Meadow, *Durkheimian Epiphanies*], or discussed the impact of women on the legal profession, *see, e.g.*, Menkel-Meadow, *The Comparative Sociology of Women Lawyers: The "Feminization" of the Legal Profession*, 24 OSGOODE HALL L.J. 897 (1986), I have uncovered no other article focusing specifically and principally on the relationship of feminist theory to clinical legal education.

76. *See supra* note 75.

operates largely outside the main arena. Viewed from the main arena, both women[77] and law school clinics[78] constitute outsiders.

Of course, the term "outside" can be understood only in a relative, not an absolute sense, acquiring its meaning only in contrast to a concept of "inside."[79] A comprehensible definition of the "periphery" is entirely interdependent on a shared understanding of the "core."[80] The insight that these concepts are

77. *See, e.g.*, West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 3-4 (1988) (arguing that leading jurisprudential theorists define "human being" in a way that excludes much of women's experience, and therefore, women themselves); *see also* C. GILLIGAN, *supra* note 30, ch. 1 (explaining how women fall outside the developmental accounts of leading thinkers such as Freud, Piaget, Erickson, and Kohlberg); Minow, *supra* note 40, at 61 & n.241 (describing the work of feminists in law, political theory, science, social science, and other fields in exposing the unstated assumptions that take men as the reference point and see women as " 'other,' 'different,' 'deviant,' 'exceptional,' or 'baffling' "); Scales, *Surviving Legal De-Education: An Outsider's Guide*, 15 VT. L. REV. 139 (1990) (describing the particular challenges of law school for those who are not white men).

Of course, women are not the only outsiders. People of color, for example, have written eloquently of their exclusion from society and social theory. *See, e.g.*, Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984) (examining the exclusion of non-whites from prestigious civil rights scholarship); Homer & Schwartz, *Admitted But Not Accepted: Outsiders Take an Inside Look at Law School*, 5 BERKELEY WOMEN'S L.J. 1 (1990) (describing the impact on outsiders in law school of the absence of diversity); Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1, 1 n.2 (1988) (defining "outsiders" as those who are not white males and who are historically underrepresented in institutions like law schools); Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323 (1989) [hereinafter Matsuda, *Victim's Story*] (describing the "outsider jurisprudence" of women and people of color).

78. *See, e.g.*, Cribbet, *President's Message*, AALS NEWSL., Feb. 1979, *quoted in* Spiegel, *supra* note 3, at 577 n.2 ("I am not opposed to limited clinical programs . . . but I do believe these programs are an important side show — the main action is in another tent."). My experience of the curricula of several law schools is that the curricular structure supports Cribbet's view of the peripheral nature of clinical education and the centrality of traditional class room education. *See also* Kennedy, *Legal Education as Training for Hierarchy*, in THE POLITICS OF LAW 40 (D. Kairys ed. 1982) (describing the ideological content of the structure of the law school curriculum).

79. *See generally* K. ERIKSON, WAYWARD PURITANS (1966) (examining how people, exemplified by the Puritans, used the concept of outside — deviance — to shape the identity and boundaries of the inside — the community); *see also* Minow, *supra* note 40, at 13, 32-33 (explaining that differences are meaningful only as comparisons).

80. *Supra* note 79; *see also* Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) (describing "outgroups" as those whose marginality defines the boundaries of the mainstream).

inextricably intertwined has led many commentators to link the construction of outsider status in contemporary culture to the structuralist tendency in Western thought to view the world in bipolar categories: e.g., masculine/feminine, white skin/black skin, reason/emotion, culture/nature, mind/body, objective/subjective, public/private, substance/procedure, theory/practice.[81] The categories are oppositional and hierarchical, such that the first term of the pair is not only different from, but superior to, the second.[82] Hence, the first term becomes dominant and the second term subordinate. If this analysis of Western cultural thought processes is correct, we delineate the boundaries of our valued concepts by developing lower-status oppositional concepts that lie outside the boundary, and then attaching a cluster of associations to each oppositional term as a way of simplifying our understanding of a reality that is much more shifting, porous, and complex.

Professor Tushnet has explored the way in which the binary structure of Western thinking links the status of law school clinics with current forms of gender hierarchy.[83] The legal work of a clinic arises from real people with all of their unpredictability, from the confusion of the unstructured exper-

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81. *See, e.g.*, Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980); Olsen, *Feminism and Critical Legal Theory: An American Perspective*, 18 INT'L J. SOCIOLOGY L. 199 (1990); *cf.* Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1 (1987) (arguing that legal and moral thought are bipolar, but not irrational).

82. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1373 n.155 (1988) ("Otherness is a corollary to the bipolar conceptualizations that characterize structuralist analysis of Western thought."); Olsen, *supra* note 81, at 200 ("[O]ne side of the dualism dominates and defines the other."). Legal theorists have drawn these insights primarily from the work of philosopher Jacques Derrida:

> Western thought . . . has always been structured in terms of dichotomies or polarities. . . . These polar opposites do not, however, stand as independent and equal entities. The second term in each pair is considered the negative, corrupt, undesirable version of the first. . . . In other words, the two terms are not simply opposed in their meanings, but are arranged in a hierarchical order which gives the first term *priority* . . . .

J. DERRIDA, DISSEMINATION viii, 1373 (B. Johnson trans. 1981) (emphasis in original); *see also* Eisenstein, *Introduction*, in THE FUTURE OF DIFFERENCE xvii, xxiii (H. Eisenstein & A. Jardine eds. 1980) ("Feminist analysis had revealed that the traditional celebration of women's 'difference' from men concealed a conviction of women's inferiority . . . . The defining of difference has traditionally been linked to the exercise of power, to those who have been in a position to say who is 'different,' and should therefore be subordinate.").

83. Tushnet, *supra* note 75.

iences of real life, and from the particular problems of impoverished client populations — all of which generate strong emotions. According to Professor Tushnet, these characteristics — taking care of needy people in an unstructured setting that evokes powerful feelings — are associated with femaleness in our culture.[84] Stated another way, these features, like femaleness, occupy the less powerful half of all of the antinomies in which they occur: rational/irrational, predictable/unpredictable, rich/poor, and reason/emotion.[85] By contrast, the traditional law school classroom concerns, at least in caricature, abstract or hypothetical parties (most of whom are not constructed as impoverished), highly structured learning situations, and analytical reasoning. These features dwell in the dominant half of their respective antinomies.[86] Thus, the traditional law school classroom, like maleness, constitutes the norm, and the clinic,[87] like femaleness,[88] the deviation.

As feminists and other thinkers have demonstrated, what one sees often depends on where one stands.[89] Given this in-

84. *Id.* at 274.

85. Fran Olsen would state it differently. She would say that our culture "sexualizes" all of the antinomies, identifying men with the first side of each, and projecting the other side onto women. Olsen, *supra* note 81, at 199.

86. Tushnet, *supra* note 75, at 275. As Tushnet indicates, these characterizations are overdrawn and false.

87. These structuralist observations may help explain why, as Mark Spiegel has observed, the historical shift in justifying the use of the case method in the traditional law school classroom from discovering legal principles to learning legal analysis could have been, but was not, perceived as a shift from theory to practice. Spiegel, *supra* note 3, at 583. That this did not happen may offer some confirmation of insights concerning the hierarchizing of the binary categories of our culturally-embedded thought structure. To have seen the case method as "practice" would have diminished its importance relative to "theory," its oppositional superior. The case method had to retain its theoretical label to maintain its stature. The relationship between power and knowledge, between politics and perceptions, required that the dominant approach to legal pedagogy remain in the dominant category of dualistic thought. Likewise, because clinical education is not the dominant approach to legal pedagogy, it would be incongruous, even psychologically dissonant, to perceive it in the dominant category of "theory." The coherence of our tacit cognitive systems compels a view of clinical education as "practice."

88. *See* D. MCCLELLAND, POWER: THE INNER EXPERIENCE 81 (1975) (asserting that psychologists "have tended to regard male behavior as the 'norm' and female behavior as some kind of deviation from that norm"); Minow, *supra* note 40, at 35-36 (asserting that "a difference 'discovered' is more aptly a statement of a relationship, expressing one person's deviation from an unstated norm assumed by the other").

89. MacKinnon articulates this insight as follows: "Mind and world, as a matter of social reality, are taken as interpenetrated. Knowledge is neither a copy nor a miscopy of reality, neither representative nor misrepresentative as

sight, Professor Tushnet's observations help to explain how the location of the characteristics of law school clinics, along with femaleness, in the less powerful half of the dichotomies in which they are often found, produces a parallel perspective on the methodological issues that each confronts. In a significant way, feminist thinkers and clinicians share a similar "standpoint" with respect to their oppositional counterparts.[90] As a

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the scientific model would have it, but a response to living in it." C. MACKINNON, *supra* note 41, at 98; *see also* Haraway, *Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective*, 14 FEMINIST STUD. 575 (1988). That things look different when viewed from different locations is a simple understanding of the term "perspective." For a definition of "perspective," see WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1687 (1986) ("a picture or figure that looks distorted except when viewed from some particular point"). Social theorists have long accepted that differently situated people view the world differently. *See, e.g.*, P. BERGER & T. LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY (1966); A. SCHUTZ & T. LUCKMANN, THE STRUCTURES OF THE LIFE-WORLD (1973); *see also* W. JAMES, *On a Certain Blindness in Human Beings*, in ON SOME OF LIFE'S IDEALS 46 (1912), *quoted in* Minow, *supra* note 40, at 49 ("[E]ach observer gains a partial superiority of insight from the peculiar position in which he stands.").

Feminists have often claimed a distinctive perspective on law, theory, and social life based on experiences tied to the social location of some women. *See, e.g.*, C. GILLIGAN, *supra* note 30; W. LEACH, TRUE LOVE AND PERFECT UNION: THE FEMINIST REFORM OF SEX AND SOCIETY (1980); Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 480; Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985).

Many other writers have described their perspectives as shaped by the experiences of their particular social location. *See* B. HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER ix (1984) (arguing that life on the margins creates a particular way of seeing reality, looking both "from the outside in and from the inside out"); W. DUBOIS, SOULS OF BLACK FOLK 3 (1903) (describing the double consciousness of American blacks who must look at themselves as others look at them); HOME GIRLS: A BLACK FEMINIST ANTHOLOGY (B. Smith ed. 1983) (describing black feminist perspectives); WITH WINGS: AN ANTHOLOGY OF LITERATURE BY AND ABOUT WOMEN WITH DISABILITIES (M. Saxton & F. Howe eds. 1987) [hereinafter WITH WINGS] (writings of the special experiences and perspectives of physically disabled women); Collins, *Learning from the Outsider Within: The Sociological Significance of Black Feminist Thought*, 33 SOC. PROBS. 514 (1986) (arguing that the "outsider within" status of black female intellectuals reflects a special standpoint that uses marginality creatively); Matsuda, *supra* note 43 (suggesting that the multiple consciousness of minorities provides a unique way of seeing that can be applied creatively to jurisprudence); Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) (arguing that the perspectives of minorities provide special normative insights); *cf.* Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989) (contesting the racial distinctiveness of minority perspectives).

90. *See, e.g.*, S. HARDING, THE SCIENCE QUESTION IN FEMINISM 136-62 (1986); Hartsock, *The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism*, in DISCOVERING REALITY: FEMINIST

result, each deployed similar methods in developing their respective alternatives to traditional legal education. These methods, designed to nourish critical insights, are especially suited to the outsider's viewpoint.[91]

One response to finding oneself relegated to the less powerful half of a dichotomy is to challenge the structural tendency in our culturally-embedded thought processes to privilege one side of each dichotomy relative to the other. Feminists and clinical educators have independently fashioned similar methods of critiquing this tendency. For example, each has sought to elevate notions of the practical, the concrete, and the experiential, such that one cannot easily disdain them as uninformed interlopers in the academy.[92] Another related strategy is to show the undesirable aspects of viewing the dominant categories such as "theory" or "masculinity" as operating in isolation from, and independent of, their respective oppositional terms. One manner of accomplishing this "status adjustment" is to reconstruct the subordinate category — such as "practical" or "feminine" — to include many of the characteristics encompassed by the dominant category.[93] Such a process would operate in the reverse direction as well.

Feminists have most frequently directed this style of critique at the masculine/feminine dichotomy and clinicians have directed it at the intellectual/practical dichotomy. Nothing, however, prevents its employment toward an understanding of other categorical systems. Although feminist theory provides a

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PERSPECTIVES ON EPISTEMOLOGY, METAPHYSICS, METHODOLOGY, AND PHILOSOPHY OF SCIENCE 283 (1983).

Feminist standpoint epistemologies have been criticized for their exclusions. *See* B. HOOKS, AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM 194-95 (1981); Omolade, *Black Women and Feminism*, in THE FUTURE OF DIFFERENCE, *supra* note 82, at 247.

91. Sandra Harding suggests that the dichotomous thinking responsible for various kinds of domination has produced similar ontologies, epistemologies, and moralities across various oppressed groups. Consequently, Harding argues for embedding gender difference along with other group differences in a "unified field theory" of oppression. *See* Harding, *The Curious Coincidence of Feminine and African Moralities: Challenges for Feminist Theory*, in WOMEN AND MORAL THEORY 296 (1987) [hereinafter MORAL THEORY]. Although clinical legal educators do not constitute an oppressed group within society as a whole, their outsider status within American legal education — as well as their representation of underclasses — helps explain their intellectual affiliation with groups oppressed by larger social forces.

92. Olsen calls this "rejecting hierarchization." *See* Olsen, *supra* note 81, at 203.

93. *See supra* notes 61-62, 66-67 and accompanying text; *see also* Olsen, *supra* note 81, at 204.

way of seeing men and women and clinical theory provides a way of seeing ideas and techniques, each also provides, more broadly, a way of seeing.[94] Clearly, their style of critique represents a challenge to dualistic thinking generally, to the traditional notion of binary oppositions as separable ideas.[95]

94. *See supra* notes 81-93 and accompanying text; *see also* Crenshaw, *supra* note 82 (applying the critique to the ideology of black/white race relations); Freeman & Mensch, *The Public-Private Distinction in American Law and Life*, 36 BUFFALO L. REV. 237 (1987) (applying the critique to the public/private dualism); Henderson, *The Dialogue of Heart and Head*, 10 CARDOZO L. REV. 123 (1988) (applying the critique to the traditional dichotomy of passion and reason).

95. In other words, the project involves "deconstructing" binary oppositions. The philosophy of Derrida, as applied to literary criticism, has spawned a genre of legal literature involving the deconstruction of legal texts. *See* Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987); Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Hegland, *Goodbye to Deconstruction*, 54 S. CAL. L. REV. 1203 (1985); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Spann, *Deconstructing the Legislative Veto*, 68 MINN. L. REV. 473 (1984); Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623 (1984). Many of these authors aim to expose contradictions in liberal theory, or explain how doctrine is used to mediate the contradictions.

For my purposes, the best definition of deconstruction is Anthony Cook's: "By deconstruction, I mean the technique of exposing hierarchical oppositions and demonstrating their difference and mutual dependence for purposes of illustrating the ideological basis of privileging one opposite over the other." Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985, 987 n.5 (1990); *see also* Balkin, *supra*, at 746-47 (describing how Derrida's technique of inverting hierarchies promises intellectual discovery by wrenching us from our accustomed modes of thought); Minow, *supra* note 40, at 43 n.155 (describing the technique of looking at female experience as central and male experience as different or deviant, not to substitute views but to reveal the power of unstated reference points). These deconstructive practices are "postmodern" in their effort to induce skepticism concerning prevailing constructions of reality. *See, e.g.*, Flax, *Postmodernism and Gender Relations in Feminist Theory*, 12 SIGNS 621, 624 (1987).

In levelling this broad critique of dualistic thinking, it is troubling to continue to use, as I have, the familiar binary labels of dualistic categories, for then the alternative conception risks replicating, by its structure of argument, the very problem it is critiquing. Nevertheless, this is a risk one sometimes assumes to be comprehensible within the linguistic and conceptual structure of a particular culture. *See, e.g.*, Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 835 (1990) ("[F]eminists must use presently understandable categories, even while maintaining a critical posture toward their use."); Dalton, *supra* note 95, at 1113 n.507 (urging self-consciousness about use of categories in recognition of the limits of culture and the difficulty of transcending current categories for organizing experience). Although mindful of the risks of distortion and oversimplification, I have chosen, in the interests of coherence, to retain somewhat imprecise labels such as "theory" and "practice," and to try to infuse these traditional labels with richer and more relational meanings.

Moreover, the feminists' and clinical educators' recognition that a theory-practice critique is inherent in their methodologies obliges them to remain faithful to this critique in the further development of their methodologies. In the next section, I examine more closely the methods that feminist thinkers and clinical educators have developed and used — and developed by use.

II. EXAMINING THE THEORY-PRACTICE SPIRAL

A. FEMINIST METHODS, FEMINIST THEORY

> The Sophoclean soul is . . . a spider sitting in the middle of its web, able to feel and respond to any tug in any part of the complicated structure. It advances its understanding of life and of itself . . . by hovering in thought and imagination around the enigmatic complexities of the seen particular . . . seated in the middle of its web of connections, responsive to the pull of each separate thread.
>
> — Martha Nussbaum[96]

None of the methods described in this section are uniquely used by women or by feminists. Nor would every feminist subscribe to them or to the artificial but heuristically useful categorization of methods presented here. Neither have feminist thinkers alone constructed these methods. Although once again mindful of the potentially misleading nature of labels, I believe that this set of methods is properly designated "feminist" because its contents have been collected, developed and endorsed by a considerable number of feminists engaged in an effort to understand and undermine gender hierarchy.[97]

No feminist method is grounded explicitly in the established methodology of a particular discipline. Although feminists have chosen to avoid the confines of a single disciplinary approach, they have often borrowed helpful approaches from other disciplines. Feminist methodology is deliberately eclectic, discouraging artificial separations of related ideas and promoting cross-disciplinary thinking that furthers its animating values.[98] I urge readers, regardless of any preconceptions about

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96. *See* M. NUSSBAUM, *supra* note 25, at 69 (footnotes omitted). The image is from Heraclitus. *Id.* Martha Minow describes it as "a vivid image of responsiveness to complexity in a world of practical choice." Minow, *supra* note 40, at 91 n.382.

97. *See* Bartlett, *supra* note 95, at 833-36 (defending a feminist label for practices with roots in other traditions).

98. *See* Sherwin, *Philosophical Methodology and Feminist Methodology: Are They Compatible?*, in FEMINIST PERSPECTIVES: PHILOSOPHICAL ESSAYS ON METHOD AND MORALS 13, 20 (1988).

the substantive goals of various activities identified as feminist, to evaluate each method that feminists have adopted on its own merits. I have attempted to make the descriptions that follow vivid enough to permit such evaluation.

1. Consciousness-Raising

Any description of contemporary feminist practice must begin with reference to consciousness-raising, the preeminent method of the movement.[99] As a method, consciousness-raising developed organically from women's coming together, drawn by a shared sense of need, to describe their lives' experiences to one another.[100] Through the collaborative telling of and listening to individual women's experiences, many participants noticed similarities and repetitions.[101] As story-patterns began to form, the collective nature of their various situations

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99. [Groups were] one medium and forum central to [consciousness raising's] development as a method of analysis, mode of organizing, form of practice, and technique of political intervention. The characteristic structure, ethic, process, and approach to social change which mark such groups as a development in political theory and practice are integral to many of the substantive contributions of feminist theory. The key to feminist theory consists in its *way* of knowing. Consciousness raising is that way.

C. MACKINNON, *supra* note 41, at 84 (emphasis in original).

100. Springing up spontaneously in the context of friendship, networks, colleges and universities, women's centers, neighborhoods, churches, and shared work or workplaces, they were truly grassroots. Many aimed for diversity in age, marital status, occupation, education, physical ability, sexuality, race and ethnicity, class, or political views. Others chose uniformity on the same bases. Some groups proceeded biographically, each woman presenting her life as she wished to tell it. Some moved topically, using subject focuses such as virginity crises, relations among women, mothers, body image, and early sexual experiences to orient discussion. Some read books and shared literature. Some addressed current urgencies as they arose, supporting women through difficult passages or encouraging them to confront situations they had avoided. Many developed a flexible combination of formats.

Id. at 84-85. For historical consideration of consciousness-raising in the women's movement in America, see C. HYMOWITZ & M. WEISSMAN, A HISTORY OF WOMEN IN AMERICA 351-55 (1978); G. LERNER, THE MAJORITY FINDS ITS PAST: PLACING WOMEN IN HISTORY 42-44 (1979), *cited in* Bartlett, *supra* note 95, at 863 n.139.

101. Concretely, consciousness-raising groups often focused on specific incidents and internal dialogue: what happened today, how did it make you feel, why did you feel that way, how do you feel now? . . . Restrictions, conflicting demands, intolerable but necessarily tolerated work, the accumulation of constant small irritations and indignities of everyday existence have often been justified on the basis of sex. Consciousness raising coheres and claims these impressions.

C. MACKINNON, *supra* note 41, at 85, 87.

emerged.[102] Once having glimpsed "the social dimension of individual experience and the individual dimension of social experience,"[103] their reactions to their experiences took the shape of structural critique.[104]

Consciousness-raising is a collective, interpersonal, reflective method aimed at articulating and advancing authentic ways of understanding and interpreting lived experiences.[105] The cooperative nature of the exploration discourages hierarchical arrangements within the group that would reproduce, in part, the problem generating the need for gathering.[106] Stated differently, feminist method incorporates an understanding of interpersonal relationships as revealing and expressing political content.

One should not misread the summary nature of this description as underplaying the difficulty and the power of consciousness-raising as a form of emancipatory struggle enacted in language.[107] Participating in consciousness-raising is not a sim-

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102. [A] woman embodies and expresses a moment-to-moment concept of herself in the way she walks down the street, structures a household, pursues her work and friendships, shares her sexuality — a certain concept of how she has survived and who she survives as. A minute-by-minute moving picture is created of women becoming, refusing, sustaining their condition. . . . Sexism is seen to be . . . so much a part of the omnipresent background of life that a massive effort of collective concentration is required even to discern that it has edges. Consciousness raising is such an effort.

Id. at 89, 90; *see also* Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 9 (1988) ("What were experienced as personal hurts individually suffered reveal themselves as a collective experience of oppression.").

103. Schneider, *supra* note 61, at 603.

104. *See, e.g.*, MacKinnon's description of the group questioning that might follow from a woman's mentioning of the way a man looked at her on the subway. By scrutinizing their everyday experiences and their reactions to those experiences, MacKinnon states that women discover that the "structure of sexual domination, the tacit relations of deference and command, can be present in a passing glance." C. MACKINNON, *supra* note 41, at 89.

105. *Id.* at 101 ("Seen as method, this process gives the resulting analysis its ground as well as its concreteness, specificity, and historicity."); *cf.* Colker, *Feminism, Sexuality and Self: A Preliminary Inquiry into the Politics of Authenticity* (Book Review), 68 B.U.L. REV. 217, 253-54 (1988) (expressing concerns that the malleability of the consciousness-raising method can promote women's inauthentic expressions).

106. C. MACKINNON, *supra* note 41, at 86-87 (describing the process of consciousness-raising as reflecting a commitment to confronting inequality and exclusion).

107. MacKinnon describes the emancipatory potential of consciousness-raising in this way: "Women [through consciousness-raising groups] experienced the walls that have contained them as walls — and sometimes walked through them." *Id.* at 91; *see also* White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFFALO L.

ple matter of speaking one's thoughts, but of discovering one's thoughts with the support and assistance of the other participants' tentative reports and statements. To know one's pain and one's experience, and to trust what one knows sufficiently to name it, in a culture that has never recognized the existence of such pain or the validity of such experience, is an extraordinary feat, involving a long process of grappling to find language that can facilitate and express that understanding.[108] The method depends on "train[ing] ourselves to respect our feelings and to transpose them into a language so they can be shared."[109]

Catharine MacKinnon has been a leading proponent of consciousness-raising as feminist method.[110] Unfortunately, she writes as if the outcome of the method is foreordained, as though the consciousness-raising process will allow participants

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REV. 1, 50 (1990) ("[W]omen have evaded complete domination through their *practice* of speaking . . . from their own intuitions and their own experience." (emphasis in original)).

108. *See, e.g.*, West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 81-82 (1987) ("[W]omen suffer in ways which men do not, and . . . the gender-specific suffering that women endure is routinely ignored or trivialized in the larger (male) legal culture."); White, *supra* note 107, at 50-51 n.160 ("Consciousness raising places new demands on the language because, through it, women grope to share feelings that have previously gone unnamed."). White's is a powerful epistemological point, more fully developed in Diamond, *supra* note 10. Writing about the paradoxical position of those of us who are "lacking words that enable us to recognize ourselves," *id.* at 275, Diamond states:

> [T]he deprivation of not being able to *name things properly* (with its result, that one's thoughts cannot properly be thought, are misexpressed or not expressed at all) — that deprivation is tied to lack of connection with cultural traditions. It appears, though, that the very fact that [some people] have experiences and commitments which require for their expression a vocabulary which they lack depends on their retaining some connection with those traditions.

Id. at 259 (emphasis in original). I read Cornell as asserting that myth and allegory are a form of consciousness-raising that help women find that vocabulary. Cornell, *supra* note 10.

109. A. LORDE, *Poetry is not a Luxury*, in SISTER OUTSIDER 36, 37 (1984); *see also* Diamond, *supra* note 10, at 270 ("A great good to be done them would be to find them the right words: words which can express their aspirations, on the one hand, and 'words which express the truth of their affliction,' on the other." (quoting S. WEIL, *Human Personality*, in SELECTED ESSAYS, 1934-43, at 23-24 (R. Rees ed. and trans. 1962))).

110. Christine Littleton sees the articulation of the feminist consciousness-raising method as the premier contribution of MacKinnon's work. *See* Littleton, *Feminist Jurisprudence: The Difference Method Makes* (Book Review), 41 STAN. L. REV. 751, 753-54 (1989).

to discover "the unity and primacy of women's experience."[111] As Angela Harris writes:

> [S]ome feminists, notably feminists of color, are unhappy with the notion that their woman self is even separate from, let alone more primary than, their other parts of self. The focus of consciousness raising on the unity and primacy of women's experience thus distorts the experience of women who simultaneously move within other relations of domination. Once the moment of consciousness raising is past, the repeated invocation of unity and primacy does not heal these very real and deeply felt divisions among feminist women.[112]

One need not read Harris's powerful critique of MacKinnon's writing as a critique of the consciousness-raising method, when honestly and openly undertaken, because nothing intrinsic to the consciousness-raising method requires that it yield, as MacKinnon implies, an essentialist view of women.[113] Rather, through consciousness-raising practices, especially when combined with storytelling practices[114] and exclusion questions,[115] a heterogeneous group of women may discover not only points of surprising commonality but a bundle of surprising differences. This discovery likely will engender not an encompassing theory of women's lot, but multiple theories of their diverse situations.[116]

Much of the content of many feminist theories is derived from these experiences of sharing experiences,[117] as is the femi-

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111. *See* Harris, *Categorical Discourse and Dominance Theory* (Book Review), 5 BERKELEY WOMEN'S L.J. 181, 186 (1990).

112. *Id.*; *see also* Flax, *supra* note 95, at 633 ("[W]ithin feminist theory a search for a defining theme of the whole or a feminist viewpoint may require the suppression of the important and discomforting voices of persons with experiences unlike our own.").

113. An essentialist view of women is one that ascribes an essential meaning to being a woman in society, a meaning that transcends race, class, age, sexual preference, and all other boundaries. For a powerful critique of gender essentialism, see E. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988); Kristeva, *Woman Can Never Be Defined*, in NEW FRENCH FEMINISMS 137 (1980). For a critique of the essentialist messages of MacKinnon's work, see Harris, *supra* note 59.

114. *See infra* notes 122-35 and accompanying text.

115. *See infra* notes 136-44 and accompanying text.

116. *See* Harris, *supra* note 111, at 195-96 ("Perhaps the answer lies not in trying to construct a single Grand Theory, a single feminist myth, but in telling many different stories.").

117. *See* C. MACKINNON, *supra* note 41, at 86 ("The technique explores the social world each woman inhabits through her speaking of it, through comparison with other women's experiences, and through women's experiences of each other in the group itself."). Commenting on MacKinnon's elaboration of the consciousness-raising technique, Christine Littleton writes:

> Shared experience, the substance of which consciousness raising is the method, is more than the aggregate of individual experiences, differ-

nist theory of theory: that theory is a practice, that it must emerge from an understanding of diverse lived realities and be tested against those realities.[118] Experience and theory fold into one another in a dialectical fashion,[119]revealing the political quality of personal life.[120] In other words, the dialectical relationship between experience and theory is rooted in the dialectical relationship between the individual and society.[121]

2. Storytelling

Storytelling, a concept much in vogue in academic circles generally,[122] is a specific form of consciousness-raising that serves as corrective. Speaking one's experiences can disrupt theory through the power of personal stories for which the the-

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ent in kind from their overlap. There is, in addition to the recognition of diversity and regularity, the *experience of shared experience*. This second level, or meta-experience, is what constructs women as an *oppositional* class. This class makes no claim to authenticity or to an essential feminism. Its authority to speak for and as women is based solely on its experience of consciously sharing women's lot.

Littleton, *supra* note 110, at 784 (footnotes omitted) (emphasis in original).

118. *See* Schneider, *supra* note 61, at 602.

119. *Id.* at 601.

120. MacKinnon elegantly articulates the interplay of the political and the personal, after describing consciousness-raising discussions about women's intimate relationships:

> When shared with other women, one's most private events often came to look the most stereotypical. . . . The personal as political is not a simile, not a metaphor, and not an analogy. It does not mean that what occurs in personal life is similar to, or comparable with, what occurs in the public arena. . . . It means that women's distinctive experience as women occurs within that sphere that has been socially lived as the personal — private, emotional, interiorized, particular, individuated, intimate — so that what it is to know the politics of woman's situation is to know women's personal lives . . . .

C. MACKINNON, *supra* note 41, at 94, 119-20. Although not all feminists would agree that women have "distinctive experience as women," most of them would recognize the close relationship between the personal and the political in women's varied lives.

121. *See* Schneider, *supra* note 61, at 603.

122. *See, e.g., Legal Storytelling*, 87 MICH. L. REV. 2073 (1989); *Pedagogy of Narrative: A Symposium*, 40 J. LEGAL EDUC. 1 (1990); *Symposium: Law and Literature*, 39 MERCER L. REV. 739 (1988); *Symposium: Law and Literature*, 60 TEX. L. REV. 373 (1982), all full issues of journals devoted to the topic of storytelling in law and legal education. Some of the literature inspiring the legal storytelling movement includes J.B. WHITE, HERACLES' BOW: ESSAYS ON RHETORIC AND POETICS OF THE LAW (1985) [hereinafter HERACLES' BOW]; J.B. WHITE, WHEN WORDS LOSE THEIR MEANING (1984); J.B. WHITE, THE LEGAL IMAGINATION (1973); Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986); Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U.L. REV. 179 (1985); Cover, *The Supreme Court, 1982 Term — Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983). A voluminous bibliography of literature on

ory cannot account. Many have challenged theories of law and other dominant social theories through this process of "narrative critique."[123] It is also a process through which women of color, lesbians, poor women, and disabled women have confronted feminist theories of women's situation that did not account for them.[124] Not surprisingly, feminists advocate

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narrative closes the symposium issue of the Journal of Legal Education. Elkins, *A Bibliography of Narrative*, 40 J. LEGAL EDUC. 203 (1990).

For academic treatment of issues of narrative in fields other than law, see, e.g., D. CARR, TIME, NARRATIVE AND HISTORY (1986); F. KERMODE, THE GENESIS OF SECRECY: ON THE INTERPRETATION OF NARRATIVE (1979); ON NARRATIVE (W.J.T. Mitchell ed. 1980); SCRIPTURAL AUTHORITY AND NARRATIVE INTERPRETATION (G. Green ed. 1987). Edward Said writes that "[n]arrative has now attained the status in the human and social sciences of a major cultural convergence." Said, *Representing the Colonized: Anthropology's Interlocutors*, 15 CRITICAL INQUIRY 205, 221 (1989).

123. One form of narrative critique involves the use of creative language practices — poetry, parables, allegories, metaphors — to express more wholly and eloquently than authoritative analytic discourse can the realities of the experience of oppression. *See* D. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); P. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR (1991) [hereinafter RACE AND RIGHTS]; Bell, *The Supreme Court, 1984 Term — Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985); Williams, *On Being The Object of Property*, 14 SIGNS 5 (1988); *see also* A. LORDE, *supra* note 109.

For a compelling discussion of the constrictions of dominant language practices and the need and prospect for subordinated peoples to develop emancipatory practices to truly articulate their situation, see White, *supra* note 107. For a discussion of transformative uses of stories, see Delgado, *supra* note 80; Matsuda, *Victim's Story*, *supra* note 77; West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145 (1985); Winter, *The Cognitive Dimension of the* Agon *Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225 (1989); Bartlett, *Storytelling* (Book Review), 1987 DUKE L.J. 760.

124. *See, e.g.*, Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191 (1990) (exclusion of lesbians' experiences); Crenshaw, *supra* note 15 (exclusion of black women's experiences); Harris, *supra* note 59 (same); Leonard, *A Missing Voice in Feminist Legal Theory: The Heterosexual Presumption*, 12 WOMEN'S RTS. L. REP. 39 (1990) (exclusion of lesbians' experiences); WITH WINGS, *supra* note 89 (exclusion of disabled women's experiences).

Omitted from this list is a challenge to feminist theory from poor women themselves. Unfortunately, as Cora Diamond discusses, one of the consequences of class oppression can be the "deprivation of being unable to put experience" — the things one knows, or might know — "into thoughts one can think." Diamond, *supra* note 10, at 269. Given rates of illiteracy among the poor, and limited access to authorized vehicles for disseminating knowledge, those who are not poor generally write on poor women's behalf. *See, e.g.*, White, *supra* note 107. Poor women, like Mrs. G., tend to articulate their situations and challenges in settings other than those prescribed for academic style discourse. *See id.* For two articles describing uses of drama by subordinated persons to express their social situation, see White, *To Learn and*

storytelling as, among other things, an antidote to the application of preconceived rules to ritualized stories consisting of spare, refined facts — a practice privileged by some sectors of academic law.[125]

The narratives offered as consciousness-raising, especially when articulated by the excluded, hold possibilities for changing the listeners' consciousness through empathetic understanding.[126] Stories, whether real or potentially real, provide

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to Teach: Lessons from Driefontein on Lawyering and Power, 1989 WIS. L. REV. 699, and White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535 (1987-88).

125. *See, e.g.*, Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886 (1989) (decrying the abstract, dispassionate, historical "male" voice of legal language, while recognizing its contextual possibilities); Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1575 (1987) ("[T]he ideological structures of legal discourse and cognition block affective and phenomenological argument."); Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099 (1989) (noting legal scholars' complaints about the abstract, acontextual focus of legal discourse, while also noting law's contextual possibilities).

For suggestions that storytelling is intrinsic to lawyering, see Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984) (illustrating how we constantly use storytelling to do "lay lawyering," helping others solve everyday, concrete problems); Elkins, *From the Symposium Editor*, 40 J. LEGAL EDUC. 1 (1990). Elkins states that:

> When we think of law as narrative we think of law differently than we do when we conceive of law as a system of rules or as an adversarial contest or game. Law may indeed be a system of rules, a means of conflict solution, a game, a form of rhetoric and argument, or a discourse, but it is also a vast reservoir of stories . . . .

Id. at 1.

126. In Richard Delgado's words:

> It is through [the narrative] process that we can overcome ethnocentrism and the unthinking conviction that our way of seeing the world is the only one — that the way things are is inevitable, natural, just, and best — when it is, for some, full of pain, exclusion, and both petty and major tyranny.
>
> Listening to stories makes the adjustment to further stories easier; one acquires the ability to see the world through others' eyes. . . . Shared words can banish sameness, stiffness, and monochromaticity and reduce the felt terror of otherness when hearing new voices for the first time.
>
> If we would deepen and humanize ourselves, we must seek out storytellers different from ourselves and afford them the audience they deserve. The benefit will be reciprocal.

Delgado, *supra* note 80, at 2439-40 (footnotes omitted); *see also* Diamond, *supra* note 10. In Robin West's words: "Literature helps us understand others. Literature helps us sympathize with their pain, it helps us share their sorrow, and it helps us celebrate their joy. It makes us more moral. It makes us better people." West, *Economic Man and Literary Woman: One Contrast*, 39 MERCER L. REV. 867, 878 (1988). Compare, for example, the extent to which

listeners with the vivid historical detail necessary for a vicarious experience that may awaken empathy.[127] They also allow the storyteller to explore and develop a sense of identity and subjectivity, elusive capacities under social conditions which widely objectify her.[128] Drawing on the storyteller's experiences and feelings, narratives can move listeners emotionally and intellectually. This emotional and intellectual engagement can contribute to careful interpretation and analysis of the story's data, promoting a fuller human understanding than analytic reasoning alone can sometimes provide.[129] Under conditions of openness, theory can be built through the consciousness-raising practice of storytelling, disrupted by the same practice, then reconstructed.

Like much of feminist method, both consciousness-raising and storytelling have antecedents elsewhere and contemporary proponents identified with other groups. Indeed, these methods are reminiscent of Edmund Husserl's "phenomenology," a philosophy of experience that calls for a return to the "things themselves."[130] Specifically, Husserl proposed that thinkers should ground in experience the conceptual apparatus of all

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you were moved by the story of Antigone and developed an understanding of Antigone's pain, as well as the pain of the other characters in the play, by virtue of reading excerpts from the play itself — which, given the conventions of law review style, were contained here in the footnotes — than by reading my cursory textual characterizations of the play.

127. Other writings linking legal storytelling to empathy include HERACLES' BOW, *supra* note 122; Henderson, *supra* note 125; Yudof, *"Tea at the Palace of Hoon": The Human Voice in Legal Rules*, 66 TEX. L. REV. 589 (1988).

The term empathy can be misused if it is not joined by a genuine effort to take others' perspectives seriously. *See, e.g.*, C. GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 59 (1983), *cited in* Minow, *supra* note 40, at 81 n.334 ("Rather than attempting to place the experience of others within the framework of [Western conceptions of self] which is what the extolled 'empathy' in fact usually comes down to, understanding them demands setting that conception aside and seeing their experiences within the framework of their own idea of what selfhood is."); Delgado, *supra* note 80, at 2440 n.87 ("[T]he hearer may consciously or unconsciously reinterpret the new story, in light of the hearer's own belief system and inventory of stock stories, so as to blunt, or even reverse its meaning.").

128. *See* White, *supra* note 107, at 50-51; *see also* Delgado, *supra* note 80, at 2437-38.

129. *See* Minow & Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37, 43-44 (1988) ("[T]he introjection of passion into a system [of reasoning] could also be called the introjection of careful thinking."); C. MACKINNON, *supra* note 41, at 81 (" 'We reason deeply, when we forcibly feel.' " (quoting Mary Wollstonecraft)).

130. E. HUSSERL, THE IDEA OF PHENOMENOLOGY 14 (W. Alston & G. Nakhnikian trans. 1964).

fields.[131] Building on Husserl and spurred by an existentialist commitment, Jean Paul Sartre sought to situate reasoning and the reasoning subject in political and historical events.[132] The goal of these and other phenomenologists was a fuller picture of what we might already know, with experience confirming the truth of the method.[133] Husserl, working primarily in the sciences, believed that intensive empiricism would reveal the essences of things.[134] On the other hand, feminists, and others who are doing similar work, hope to discover the absences of things — the exclusion of a variety of perspectives from law and other disciplines that subvert what we can know.[135]

3. Exclusion Questions

In a recent article, Katharine Bartlett has named and described methods related to consciousness-raising and storytelling that feminists have added to the standard array of approaches to legal reasoning.[136] One of these methods she calls "asking the woman question" (or "asking the exclusion question").[137] Exclusion questions help feminists develop structural theory from the narratives of experience explored in consciousness-raising. Asking such questions entails asking about the exclusion of various women's needs, perspectives, and experiences from law itself or from other social and political institutions. Storytelling and consciousness-raising provide participants with the basis for knowing how different women

131. E. HUSSERL, IDEAS: GENERAL INTRODUCTION TO PURE PHENOMENOLOGY 84 (W.R. Boyce Gibson trans. 1962).

132. *See generally* J. SARTRE, SEARCH FOR A METHOD (H. Barnes trans. 1968).

133. *Id.*

134. E. HUSSERL, *supra* note 131, ch. 1.

135. *See* Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128 (1989). Williams states that:

> We live in an era in which women and people of color compose and literally define both this society's underclass and its most underserved population. Remedying this therefore ought to be, *must* be, this society's most pressing area of representational responsibility; not only in terms of fairly privatized issues like "more pro bono," or more lawyers taking on more cases of particular sorts, but in really examining the ways in which the law operates to omit women and people of color at all levels, including the most subtle — to omit them from the literature of the law, from the ranks of lawyers, and to omit them from the numbers of those served by its interests.

Id. at 2128 (emphasis in original).

136. Bartlett, *supra* note 95.

137. *Id.* at 831. As Bartlett notes, "A question becomes a method when it is regularly asked." *Id.* at 837.

understand and report their needs, perspectives, and experiences, such that participants can identify institutional forms excluding various women. Understanding the commonalities and differences of many women is a necessary aspect of discovering the mismatch between them, or particular groups of them, and cultural institutions. And understanding how various women experience institutions precedes discovery of how institutions respond to or ignore various women's interests. Critical theory develops from analyzing the perceived reasons for, and implications of, women's exclusion, and the consequences of their imagined inclusion.[138]

Nothing can limit these methods to use in women's exploration of the workings of a gender system. Indeed, one cannot understand the gender system in isolation from other social structures, because women come in a full complement of races, classes, cultures, sexual orientations, and physical abilities, all of which affect the meaning, the quality, and the security of their lives in a multitude of daily ways. To speak of one's experience as a woman is to speak of one's experience in a society which makes gender, and all of these other categories as well, such powerful socializing forces that they simultaneously influence one's identity, treatment, and opportunity. Any structural critique that emerges from viewing women as a diverse class must reflect their multiple identities and their multiple and varied experiences in the social world. As pure method, asking a genuine and inclusive woman question always means asking a broader question about exclusion across all of the strata in which women, and many men, are found.[139]

Of course, feminists can confine the exclusion question to gender analysis if only class-privileged, heterosexual, able-bodied white women who relate to subordination solely in terms of gender are asking the question.[140] Historically, this has happened. As a result, feminists' structural critique, replicating the errors of much of the dominant social theory shaped largely

138. Bartlett elaborates these points more systematically. *Id.* at 837-43; *see also* Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 BERKELEY WOMEN'S L.J. 64, 72-77 (1985) (describing a series of questions that feminists ask about women's exclusion, and the possibilities for their inclusion).

139. For a powerful statement of this contention, see E. SPELMAN, *supra* note 113; *see also* Lewin, *Feminist Scholars Spurring a Rethinking of Law*, N.Y. Times, Sept. 30, 1988, at B9, col. 3 ("In Gilligan's terms, it's not just one 'different voice' we've been ignoring, it's many." (quoting Mary Joe Frug)).

140. *See* Bartlett, *supra* note 95, at 847-48.

by privileged men, has unwittingly claimed the perspective of some women as universal for all women.[141] But, the value of the methods described above is that, if practiced earnestly, if the theories generated are persistently examined, then the distortions of overstated claims are likely to emerge, as they have among feminists.[142] I am not suggesting that feminists have easily recognized the solipsism problem[143] or that they have eagerly received suggestions for its cure; territoriality and defensiveness can plague even those who espouse good methods. In the wake of a perceived solidaristic challenge, however, a commitment to disciplined reappraisal, with the assistance of perspectives elaborated by many previously excluded women, has generated a dawning awareness of the breadth and diversity of women.[144]

4. Contextual Reasoning

In my reading of Bartlett's taxonomy, the methods of consciousness-raising, including storytelling and asking the woman (exclusion) question, each represent moments in a process that she terms "feminist practical reasoning."[145] Bartlett views this form of reasoning as the joining of an Aristotelian-style practical deliberation,[146] as developed by many thinkers,[147] with the consideration of multiple perspectives.[148] The hallmark of feminist practical reasoning is its emphasis on context:[149] on un-

141. *See* Minow, *supra* note 40, at 62-65.

142. *Id.* at 64 ("[T]he method of consciousness-raising — personal reporting of experience in communal settings to explore what has not been said — enables self-criticism among feminists even about feminism itself.").

143. A. RICH, *Disloyal to Civilization: Feminism, Racism, Gynphobia*, in ON LIES, SECRETS, AND SILENCES 299 (1979).

144. *See supra* note 124.

145. Bartlett, *supra* note 95, at 849-63.

146. Aristotle termed "practical wisdom" the capacity of reasoning from particulars to equitable results, while weighing but not exclusively relying on general rules and principles in reaching a decision. ARISTOTLE, *Nicomachaean Ethics*, in THE BASIC WORKS OF ARISTOTLE 1027-28 (1941). Aristotle recommends practical wisdom as a way of making moral judgments in the face of competing and incommensurable values. *See* A. RORTY, MIND IN ACTION: ESSAYS IN THE PHILOSOPHY OF MIND 272 (1988) (describing Aristotelian practical reasoning as deliberation about appropriate ends).

147. *See, e.g.*, T. NAGEL, *The Fragmentation of Value*, in MORTAL QUESTIONS 134 (1979); Hampshire, *Public and Private Morality*, in PUBLIC AND PRIVATE MORALITY 23 (1978); Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 67-68 (1980); Bartlett, *supra* note 95, at 850 n.79 (sources cited).

148. Bartlett, *supra* note 95, at 850.

149. This emphasis has a normative as well as an epistemological dimen-

derstanding the intricate details of complex human situations that give rise to legal or other conflicts and, with the aid of prior wisdom and experience, using this understanding to find solutions that are tailored to the particularities of the situation.[150]

The value of all the feminist methods described here is their capacity to expand context. Faithfulness to these methods requires vigilance in searching for and carefully attending to perspectives and interests often overlooked because they are unfamiliar to the reasoner.[151] The following example illustrates how these features of feminist practical reasoning, as described by Bartlett, can affect the legal decisionmaking process.

Consider the prosecution of a battered woman who uses a weapon against her batterer during a period of quiescence in the abuse cycle.[152] She claims self-defense, but the prosecution insists that the charged acts constitute excessive force in violation of the duty to retreat.[153] A court applying self-defense doctrine to these circumstances will likely consider the state's policy interests in excluding excessive force and including a duty to retreat in the construction of self-defense. The court

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sion, because "reasoning from context allows a greater respect for difference." *Id.* at 849.

150. *Id.* at 851 ("Themselves generative, new situations give rise to 'practical' perceptions and inform decisionmakers about the desired ends of law."); *see also* M. NUSSBAUM, *supra* note 25, at 300-01 (ethical choice must confront "the situation itself, by a faculty that is suited to confront it as a complex whole").

151. Taking minority perspectives seriously calls for a process of dialogue in which the listener actually tries to reach beyond the assumption of one reality, one version of the truth. There is no neutrality, no escape from choice. But it is possible to develop better abilities to name and grasp competing perspectives, and to make more knowing choices thereafter.

Minow, *supra* note 40, at 69-70.

152. I have chosen this example with the aid of a paper written by Barbara Siegel, a student in my course on Feminism and Jurisprudence in Spring, 1988. *See* B. Siegel, Reasonable Men and Crazy Women: Re-thinking the Battered Women's Self-Defense Cases (1988) (unpublished paper on file with author). Her superb treatment of the issues made elaboration of the example in this section quite easy. Katharine Bartlett's use of an example of a marital rape case to illuminate the working of feminist practical reasoning, Bartlett, *supra* note 95, at 858-62, also aided the development of this example, drawn, like hers, from a substantive field — criminal law — in which I teach.

153. According to the traditional doctrine of self-defense, the use of deadly force is justified only where an actor has been attacked with deadly force and reasonably believes that he or she is in imminent danger of death or serious bodily harm. The imminence requirement implies a duty to retreat when serious harm is not imminent. W. LAFAVE & A. SCOTT, CRIMINAL LAW 456-61 (1986).

also may consider the common law interpretations of what constitutes excessive force and the duty to retreat. As in any prosecution, the court also would likely consider the interests of the person harmed, the man who has been assaulted in this instance, and others like him, as well as the reasons for, and interests of, the defendant in claiming self-defense.

A feminist decisionmaker employing contextual reasoning would consider all of the information above, but also would stretch the scope of the context by including the "stories" and perspectives of these litigants, and others who are involved in battering relationships. The decisionmaker might consider women's typical size and strength disadvantages; their absence of training, such as in the military and on football teams, in physical protection;[154] the extent to which their physical efforts to defend themselves are met with increased violence immediately or later;[155] and data about battered women whose batterers seriously injured or killed them without using weapons, for purposes of evaluating whether a woman's use of a weapon is truly excessive.[156] Sensitized by this context, the reasoner would listen to the story of *this* battered woman and try to take her perspective,[157] evaluating her story by paying special attention to its similarities to, and its differences from, important features of the collected stories.[158] The reasoner also would inquire about the defendant's perceptions of the imminence of her danger in light of the past patterns of her abuse and her understanding of these patterns.[159] Additionally, the decisionmaker would seek to understand the perspective of the man who has

154. *See* C. MACKINNON, *Women, Self-Possession, and Sport*, in FEMINISM UNMODIFIED 117, 121 (1987) (discussing women's socialization to avoid using physical force, whereas men use athletics as "a form of combat"); MacKinnon, *Toward Feminist Jurisprudence* (Book Review), 34 STAN. L. REV. 703, 731-32 (1982) (noting that the case law upholding women's exclusion from combat in the military both reflects and creates the circumstances whereby women generally lack the means to repel a male assailant). I am grateful for these examples to B. Siegel, *supra* note 152, at 13.

155. *See* Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 134-35 (1985).

156. The cause of death for most women killed by their batterers is kicking or beating. A. JONES, WOMEN WHO KILL 300 (1980). Particularly in an encounter involving persons mismatched as to physical training and strength, the hands and feet of the physically abler opponent can be deadly weapons.

157. *See, e.g.*, Minow, *supra* note 40, at 60 ("The process of looking through other perspectives does not itself yield an answer, but it may yield an answer different from the one that the judge would otherwise have reached.").

158. *Id.* at 92 ("The choice from among principles . . . implicates choices about which differences, and which similarities, should matter.").

159. *See* A. BROWNE, WHEN BATTERED WOMEN KILL 172 (1987) (indicating

been assaulted in these circumstances.[160] Contextual reasoning dictates that the decisionmaker weigh this welter of complex information before making the legal and moral choice about how to apply notions of self-defense in this case.[161]

Opening up the actual circumstances of the battering experience and the social and psychological conditions under which it occurs may generate insights that aid in the resolution of cases involving battering, insights that would remain submerged in a purely logical analysis of the meaning of self-defense. Moreover, the decisionmakers in such cases may find themselves moved by the process of plumbing human misery so directly. Feminists would urge them to reflect on these feelings, and not suppress any influence these feelings have on their understanding of the real human consequences of legal judgments.[162]

Obviously, contextual reasoning cannot and does not re-

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that studies find battered women able to detect subtle changes in their batterers' behavior that signal increased violence).

160. Feminists urge judges to pay special attention to the perspectives of those who historically have been outsiders to jurisprudence, because these are the stories most easily overlooked and misunderstood without extraordinary effort. *See* Matsuda, *Victim's Story*, *supra* note 77, at 2321. But the perspectives of all relevant persons, even those already overrepresented in doctrine, *see* Finley, *supra* note 125, at 892, must be taken seriously in the judging process. *See* Bartlett, *supra* note 95, at 882 (arguing that feminist methods require feminists to try to understand, for example, the perspectives of those who oppose abortion and of those potential or actual "date-rapists" whose social conditioning leads them to interpret certain women's actions as inviting sexual encounter); Minow & Spelman, *supra* note 129, at 61-65 (critiquing the Supreme Court's majority and dissenting opinions in a case involving censorship of a high school newspaper for failing to consider the perspectives of all parties).

161. *See* Minow, *supra* note 40, at 92 ("[I]mmersion in particulars does not require the relinquishment of general commitments. . . . These are moral choices, choices about which voices should persuade those who judge. Even when we understand them, some voices will lose.").

162. [T]he task of human judgment is not to transcend the self or human nature, but to use all helpful aspects of it; not to close off reactions but to reflect upon them; not to give in to all intuitions but to test them, and then test the tests, against their meanings in the actual lives of others.

Minow & Spelman, *supra* note 129, at 48. Martha Minow and Elizabeth Spelman wrote this article in response to Justice William Brennan in Brennan, *Reason, Passion, and the "Progress of Law,"* 10 CARDOZO L. REV. 3 (1988) (printing Brennan's remarks at the forty-second annual Benjamin N. Cardozo Lecture delivered Sept. 17, 1987). Justice Brennan argued that passion, defined as "the range of emotional and intuitive responses to a given set of facts or arguments, responses which often speed into our consciousness far ahead of the lumbering syllogisms of reason," are an important and inevitable feature of the process of judging. *Id.* at 9. He urges judges to avoid operating "on the

quire attention to every concrete detail of every context. As Bartlett has carefully demonstrated, pre-existing generalizations about what is relevant will bring only some of the details to the surface.[163] Contextual reasoning merely suggests that decisionmakers view the scope of legal relevance quite broadly and remain open to persuasion about the relevance of novel facts and the insights they can spawn.[164] Decisionmakers need not ignore the prevailing rules potentially applicable to the case. As Bartlett explains, rules distill prior knowledge about the best response to a particular situation. These rules, however, are limited to the extent that the rulemakers can anticipate future situations.[165] Decisionmakers thus cannot ignore the power of unusual and changing circumstances to suggest new interpretations of rules.[166] Because feminists have recognized the plurality of perspectives, and the historical exclusion of particular perspectives from legal decisionmaking, they often value rules that offer flexibility in responding to the complexity and diversity of human conflict.[167]

Such a highly contextualized approach to legal decision-

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basis of reason alone" so as not to cut themselves off from "the wellspring from which concepts such as dignity, decency, and fairness flow." *Id.* at 22.

163. Bartlett, *supra* note 95, at 856 ("Generalizations identify what matters and draw connections to other cases. I abstract whenever I fail to identify every fact about a situation, which, of course, I do always.").

164. For feminists, practical reasoning and asking the woman question may make more facts relevant or "essential" to the resolution of a legal case than would more nonfeminist legal analysis. For example, feminist practical reasoning deems relevant facts related to the woman question — facts about whose interests particular rules or legal resolutions reflect and whose interests require more deliberate attention. . . . Feminist practical reasoning assumes that no a priori reasons prevent one from being persuaded that a fact that seems insignificant *is* significant . . . . Likewise, although generalizations that render detail irrelevant require examination, they are not a priori unacceptable.

Id. at 856-57 (emphasis in original).

165. *Id.* at 852 ("Rules represent accumulated past wisdom, which must be reconciled with the contingencies and practicalities presented by fresh facts. Rules provide signposts for the appropriate purposes and ends to achieve through law.") (footnote omitted).

166. Ideally, however, rules leave room for the new insights and perspectives generated by new contexts. . . . [T]he practical reasoner believes that the specific circumstances of a new case may dictate novel readings and applications of rules, readings and applications that not only *were not*, but *could not* or *should not* have been determined in advance.

Id. at 853 (emphasis in original) (footnote omitted).

167. *Id.* at 832; *cf.* RACE AND RIGHTS, *supra* note 123, at 146-65 (describing how, in a context of racial hierarchy, operating by formal rules often provides greater protection and autonomy for blacks than do informal arrangements).

making — involving a careful interest analysis of the litigants, the state, and any other relevant persons or communities, and explicit consideration of the social contexts that give rise to these interests[168] — requires decisionmakers to wrestle with their decisions out loud. They must elaborate fully the actual thinking processes that they have undertaken and the goals that they have sought to achieve in upholding certain principles over others.[169] Simply offering some justificatory rhetoric for the eventual outcome is not sufficient.[170] Such a process of disciplined reflection and conscious accountability is likely to improve the quality of thinking.[171] Moreover, this decisionmaking process respects those whom the decision affects and thus may help avoid the reenactment of Antigone's and Creon's tragic inabilities to take a conflicting viewpoint seriously.[172] This process also may help litigants and observers to appreciate, and perhaps accept, a decision's reasonableness even when its effect on them is adverse.[173] Only in this way can law and other institutions truly respond to real people, real problems, and the real interests at stake.[174]

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168. *See, e.g.*, Kennedy, McCleskey v. Kemp: *Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1391-93 (1988) (arguing that a case involving disproportionate application of the death penalty to those who murder whites rather than blacks involves the interests of the defendants and the judge as well as the black and white communities in determining the value of the loss of the lives of black murder victims).

169. "A judge decides for ten reasons/nine of which nobody knows." Winter, *supra* note 123, at 2225 (citing a Chinese proverb). Several authors urge candor about judicial reasoning as a value in itself and as clarification of the values at stake in the cases decided. *See* Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 30-31 (1986); Minow & Spelman, *supra* note 129, at 54-56; Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 32 (1984). For a general scholarly treatment of the subject, see Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987).

170. Minow & Spelman, *supra* note 129, at 67 ("Otherwise, judicial opinions risk becoming ritualized recitations of the talismanic phrases that are compatible with the result announced, or cleverly edited statements from prior judicial conversations removed from their original contexts and bearing dubious relationships to the case at hand.").

171. *Id.* at 55 ("[I]f the judge cannot join the official statement of reasons for a decision with its sources in the judge's own action, the judge loses the chance, and slackens the discipline, to use words and concepts to frame and improve judgment — to combine 'reason' and 'passion' in a process of conscious reflection.").

172. *See* M. NUSSBAUM, *supra* note 25, at 54-67.

173. *See* Minow & Spelman, *supra* note 129, at 68 (arguing that judges' failure to acknowledge the difficulty of their choices undermines the persuasiveness of opinions to those who disagree).

174. *Id.* at 44, 60 (arguing that careful judicial thinking requires a "respon-

5. Epistemological and Ethical Questions

The narrative and consciousness-raising methods that uncover a range of perspectives, when combined with exclusion questions and contextual reasoning, have helped feminists to develop a powerful epistemological critique of law and other disciplines.[175] By using their experiences in general and their experiences of legal institutions in particular, feminists have shown that doctrinal categories presented as neutral and objective often exclude the perspectives of many while enshrining a particular point of view.[176] For example, when courts faced with the issue of self-defense ruled that a repeatedly battered woman's use of a weapon against her batterer during a lull in the abuse cycle constituted excessive force in violation of a duty to retreat, many women realized that the law of self-defense captured the imagery of two men of comparable size, strength, and physical training engaged in a single confrontation.[177]

Not surprisingly, those whose experiences are reflected in the law of self-defense are likely to view the law as neutral, objective, and sound.[178] Those whose experiences are at odds

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siveness to common humanity" and a "flexibility and sensitivity to new circumstances" that encourages "a direct human gaze between those exercising power and those governed by it"); *see also* Goldfarb, *When Judges Abandon Analogy: The Problem of Delay in Commencing Criminal Prosecutions*, 31 WM. & MARY L. REV. 607 (1990) (arguing for a contextual reasoning approach to address genuine problems and interests at stake in the context of a particular criminal procedural issue).

175. In fact, as MacKinnon says, feminism's epistemology is its politics. C. MACKINNON, *supra* note 41, at 120. A feminist epistemological approach as applied to law is perhaps best articulated in Minow, *supra* note 40, on which I rely heavily in this Section.

176. *See* Minow, *supra* note 40, at 32, 69, stating that:

> [T]ypically we adopt an unstated point of reference when assessing others. From the point of reference of this norm, we determine who is different and who is normal. . . . The unstated point of comparison is not neutral, but particular, and not inevitable, but only seemingly so when left unstated. . . . Thus, theorists in many fields have attempted to identify suppressed cultures and voices that represent potential and actual points of resistance to dominant cultural forms.

Id.

177. *See* B. Siegel, *supra* note 152, at 12-13; *see also* Schneider, *Equal Rights to Trial For Women: Sex Bias in the Law of Self-defense*, 15 HARV. C.R.-C.L. L. REV. 623, 644 (1980) (urging recognition of self-defense in battered women's assaults of batterers).

178. *See* Minow, *supra* note 40, at 57-58, 73 (noting that unstated norms embedded in law entrench one point of view as natural and that "[t]he more powerful we are, the less we may be able to see that the world coincides with our views precisely because we shaped it in accordance with those views"). Because privileged men can constitute reality as they apprehend it, MacKinnon observes that they have "Cartesian doubt for good reason." C. MACKIN-

with the dominant position embedded in the doctrine can see more easily the particularity and partiality of the law and its implicit assumptions about how the world works and about whose perspectives count.[179] Accordingly, if those whose perspectives are reflected in the structures and institutions of dominant legal culture hold exclusive official authority to judge others, and if they exercise that judgment without self-reflection or criticism, then those who differ from the dominant norms will look not only deficient but deviant.[180] To render fairer judgments,[181] decisionmakers must seriously consider the multiplicity of perspectives.[182]

Martha Minow has elegantly elaborated the epistemological challenge of feminist theory expressed in its insistence on the link between power and knowledge.[183] She demonstrates how feminists try to disentangle uses of power from judgments of quality and confront standards of quality constructed on images of privileged males.[184] Minow views feminist work as

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NON, *supra* note 41, at 122. Women, she says, have a problem opposite to Descartes'. *Id.* at 123.

179. MacKinnon writes of the challenge that a "dissident reality" can pose to the prevailing system:

> The point of view of a total system emerges only when confronted, in a way it cannot ignore, by a demand from another point of view. This is why epistemology must be controlled for ontological dominance to succeed, and why consciousness raising is subversive. It is also why, when law sides with the powerless, as it occasionally has, it is said to engage in something other than law — politics or policy or personal opinion — and to delegitimate itself. When seemingly ontological conditions are challenged from the standpoint of a dissident reality, they become visible as epistemological. Dominance suddenly appears no longer inevitable. When it loses its ground it loosens its grip.

C. MACKINNON, *supra* note 41, at 239-40.

180. *See supra* note 88; *see also* Minow, *supra* note 40, at 53 (claiming that a stance that treats one's own perspectives as unproblematic renders other perspectives invisible and beyond discussion).

181. Minow, *supra* note 40, at 76 ("[T]he solution [to acting ethically] is not to adopt and cling to some new standpoint, but instead to strive to become and remain open to perspectives and claims that challenge our own.").

182. *Id.* at 73-74 ("[T]he more marginal we feel from the world . . . the more likely we are to glimpse a contrast between some people's perceptions of reality and our own.").

183. *Id.* at 65 (asserting that power is related to knowledge and that the version of reality with the power to prevail constructs internal scripts about how to know); Flax, *supra* note 95, at 633 (explaining that the work of Foucault and others has sensitized us to the connection between knowledge claims and power).

184. Minow, *supra* note 40, at 61 (feminism has "named the power of naming" and "challenged both the use of male measures and the assumption that women fail by them"); *see also* C. GILLIGAN, *supra* note 30, at 69-70 ("[A]s long as the categories by which development is assessed are derived from research

exposing the conceptual distortions that can arise from differential access to knowledge systems and to making meaning in the world.[185] The recognition, by Minow and others, that multiple perspectives exist leads feminists to deny the possibility of neutrality and objectivity.[186] Therefore, feminist lawyers and law teachers perpetually seek to uncover whose perspectives and interests are represented in a particular law, case, practice or institution, and whose are excluded, and how including excluded viewpoints might reshape the analysis.[187] The feminist methods of storytelling and consciousness-raising, exclusion questions and contextual reasoning, offer hope that participants can come to understand that which they have not experienced and is not in their interests.[188] In this sense, feminist methods have ethical substance and feminism constitutes a moral philosophy.[189]

Although some may misapprehend it as such, feminism's moral philosophy is far from moral relativism.[190] The feminist belief that all persons are situated in their experiences, and

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on men, divergence from the masculine standard can be seen only as a failure of [women's] development.").

185. Those who win a given struggle for control [of definitions of reality] have the best access to the means of producing knowledge, such as the mass media and schools. Such control may even shape the terms of access for other points of view, so that exclusions appear neutral, based on merit or on other standards endorsed even by those who remain excluded.

Minow, *supra* note 40, at 67.

186. *Id.* at 45-46 ("This aspiration to impartiality, however, is just that — an aspiration rather than a description — because it may suppress the inevitability of the existence of a perspective and thus make it harder for the observer . . . to challenge the absence of objectivity.").

187. *See supra* note 138 and accompanying text; *see also* Minow, *supra* note 40, at 86 ("The difficulties each of us has in seeing around the bend of our own thought can be eased with the help of insights from others who are positioned differently.").

188. *See* Bartlett, *supra* note 95, at 849 ("The difficulty in recognizing oppression one has not experienced . . . makes the necessity of a 'method' all the more apparent.").

189. Drawing on the insights of postmodernism, Drucilla Cornell has suggested a conception of "ethical feminism" developed, in part, through the retelling of myths and allegories of "the Feminine." *See* Cornell, *supra* note 10, at 645.

190. *See* Bartlett, *supra* note 95, at 867 ("[I]f being right means that one has expressed one's personal tastes or interests which have no greater claim to validity than those of anyone else, being right is a rhetorical device used to assert one's own point of view, and verification is both impossible and pointless."). Bartlett explores a range of feminist epistemological stances — rational empiricism, standpoint epistemology, postmodernism and positionality. Relativism is not on the menu.

that our knowledge is therefore contingent, creates a moral and political vision that requires each of us to broaden our experiences through consideration of the experiences and perspectives of others with whom we were previously unfamiliar.[191] The claim that we cannot surmount subjectivity involves an obligation always to try.[192] We must attempt to understand what the world looks and feels like to others, and continually to challenge and revise our own viewpoint in light of heightened sensitivity to others' experiences.[193] This approach may enable us to avoid the moral error of assuming that experiences mean to others what they mean to us.[194] To respect others and to treat them justly requires taking their perspectives seriously.[195]

These views compel a conception of truth that is, in Bartlett's terms, "positional."[196] Positionality means that one can

191. *See supra* note 151 and accompanying text.

192. This paradox has a corollary. *See* Minow, *supra* note 40, at 75 ("Only by admitting our partiality can we strive for impartiality.").

193. With these observations, we have moved from Husserl's phenomenology to Heidegger's hermeneutics. Whereas Husserl believed in objective empiricism, *see* text accompanying note 134, Heidegger, and subsequently Gadamer, reoriented phenomenology to account for the preconceptions of the perceiver who is situated in her prior experiences. They suggest that one can come to understand another's viewpoint by constantly seeking to revise the distortions of one's pre-understandings through attention to the differences between one's starting assumptions and another's perspective. Although this task requires a persistent skepticism about our own judgments, it affords significant interpretive achievements — glimpses of truths — however partial. Although Gadamer focused primarily on textual understandings, Heidegger focused on understandings of the world as well, for all understanding, he believed, is fundamentally through language. *See* H. GADAMER, TRUTH AND METHOD (1975); M. HEIDEGGER, BEING AND TIME (1962). To this "hermeneutics of tradition" has been added a "hermeneutics of suspicion," with Habermas and Derrida finding reason for skepticism about the ideology of language itself — not merely of those who use it. *See* Derrida, *Three Questions to Hans-Georg Gadamer*, in DIALOGUE AND DECONSTRUCTION: THE GADAMER-DERRIDA ENCOUNTER 52 (1989); Habermas, *A Review of Gadamer's Truth and Method*, in UNDERSTANDING AND SOCIAL INQUIRY 335 (1977). Feminism has drawn on hermeneutics in developing its eclectic theory of knowing.

194. *See* Spelman, *On Treating Persons as Persons*, 88 ETHICS 150, 152 (1978) ("Treating someone as a person . . . involves keeping an eye on the tendency to think of others on the models of ourselves.").

195. *See id.* at 161 ("[W]hen you recognize and respond to the person I am, you are treating me as the person I am in a maximal sense."); *see also* Minow & Spelman, *supra* note 129, at 60 (asserting that whether judges acknowledge the humanity of each litigant before them is a basic question of justice); Minow, *supra* note 40, at 74 ("We prefer to have our perceptions validated; we need to feel acknowledged and confirmed. But when we fail to take the perspective of another, we deny that very acknowledgment and confirmation in return.").

196. *See* Bartlett, *supra* note 95, at 880-87.

trust and act on the theories that seem to make the best sense of one's lived experiences. One can do so, however, only by engaging in an ongoing process of critical reflection, such as that described above, when shaping the theories, and by seeking to verify and modify those theories in the crucible of new experiences.[197] Simply stated, what we know depends on what we do. Good theory requires engagement in a sound theory-generating practice that can move us toward truths in a gradual, upward spiral.[198]

B. CLINICAL METHODS, CLINICAL THEORY

> A student of philosophy who turns from the discourses of the great metaphysicians to the oration of the prophets may feel as if he were going from the realm of the sublime to an area of trivialities. Instead of dealing with the timeless issues of being and becoming, of matter and form, of definitions and demonstrations, he is thrown into orations about widows and orphans, about the corruption of judges and affairs of the market place. Instead of showing us a way through the elegant mansions of the mind, the prophets take us to the slums.
>
> — Abraham Heschel[199]

Like feminism, clinical education is not monolithic. Inherent in the term "clinical" is a reference to medical education, an indication that, as originally conceived, clinical legal education involved direct client service.[200] Given the diversity of law school programs now labelled clinical, the medical analogy obscures more information about its legal counterpart than it illuminates. For purposes of this Article, I will focus on the earliest and most common form of clinical education: a setting in which law students, under supervision, represent indigent people.[201] Yet, even this limitation does not focus my examina-

197. *Id.* at 884 ("Positionality reconciles the existence of reliable, experience-based grounds for assertions of truth upon which politics should be based, with the need to question and improve these grounds.").

198. For a list of theorists who view effort as a component of truthseeking, see *id.* at 881 n.229. *See also* Minow, *supra* note 40, at 74 (implying that we move toward truth by deliberately engaging "other people's truths").

199. A. HESCHEL, THE PROPHETS 3 (1962).

200. *See, e.g.*, Creger & Glaser, *Clinical Teaching in Medicine: Its Relevance for Legal Education*, in CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE 77 (E. Kitch ed. 1970).

201. Bob Condlin describes this clinical model as *primum inter paria*. *See* Condlin, *supra* note 65, at 46. In a previous article, Condlin attributes the rise of this model of clinical education to the priorities of the Council on Legal Education for Professional Responsibility, clinical education's early benefactor. *See* Condlin, *Socrates' New Clothes: Substituting Persuasion for Learning in Clinical Practice Instruction*, 40 MD. L. REV. 223, 223-24 n.2 (1981) [hereinafter Condlin, *Socrates' New Clothes*].

tion on a single entity, for various clinical programs subsumed in this description conduct and defend themselves in a variety of ways. Inevitably, then, my descriptions will capture and endorse particular versions and visions of clinical education.

I present below a taxonomy of clinical methods that I have distilled from the clinical literature. As in the taxonomy of feminist methods, the categorical divisions are somewhat artificial and overlap considerably, acquiring their full meaning only with reference to one another. Moreover, although some clinics may employ all of these methods, I know of no clinic that emphasizes all of them equally.[202] Nevertheless, the list is not constructed hierarchically, for — in my view — the ideal clinic, when operating in highly favorable circumstances, would promote all of the learning methods described.[203] I do not suggest that most clinics approach the ideal, but offer this taxonomy as aspiration and inspiration.

1. Learning from Experience

Clinical education offers law students a method. In an influential essay, Gary Bellow described this method as involving the students' assumption of recognized roles in the legal system, the use of the students' experiences in performing these

202. *See* Condlin, *supra* note 65, at 47 ("Usually, clinical teachers have favorites among these objectives and shape their programs to emphasize one or two in a sustained and systematic way.").

203. The curriculum of the Boston College Criminal Process Clinic, which I direct, is designed to promote all of the learning methods described, although constraints of time, personnel, and funding have limited more effective accomplishment of some of these methods. Developing these learning methods while providing competent representation, particularly when personal liberty is at issue, is a precarious pedagogical balancing act, but is fostered by small, selective caseloads. This is a luxury of clinical programs compared to most other lawyering settings with primary aims of profit or service and without academic affiliations. *See* Bellow & Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U.L. REV. 337 (1978); Kettleson, *Caseload Control*, 34 NLADA BRIEFCASE 111 (1977); Silver, *The Imminent Failure of Legal Services for the Poor: Why and How to Limit Caseload*, 46 U. DET. J. URBAN L. 217 (1969). Each of these articles recognizes the difficulty while pressing the need to limit caseloads in a legal services context. For a thoughtful discussion of the relationship between caseload and service in a legal services setting, see Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. REV. 1101 (1990).

The unusual luxury of limited caseloads in law school clinics creates the urgency for addressing the enumerated learning needs in these clinics, because professional life may afford few repeat opportunities. I acknowledge, however, that the fact that the profession does not come close to meeting the profound legal needs of the poor renders the tradeoff of caseload for education a particularly tragic one. *But see infra* note 228 and accompanying text.

roles as the focus of intellectual inquiry, and the examination of particular tensions that arise in this process as a source of insight.[204] The tensions that Bellow identified arose from the clinical teacher asking students (1) to participate in the legal environment while observing their own participation, (2) to assume responsibility for cases while refusing, due to the potentially harmful consequences to others, to afford them full autonomy, and (3) to experience their sometimes conflicting identities as lawyers and students simultaneously.[205] Clinical pedagogy shares with feminism an emphasis on the examination of experience — here, a particular set of experiences — as a source of understanding, and the "continual reconstruction of knowledge in the light of new experience."[206]

The students' responsibilities, in the colorful and chaotic clinical environment, create fertile soil for learning. Persons in this situation must locate signposts and models by which to steer their course and must develop a conceptual scheme for assimilating and accommodating their feelings and experiences.[207] These motivational conditions are likely to stimulate students to discuss with their teacher criteria for evaluating lawyers' performances and theories for explaining the repertoire of professional and institutional behaviors that they have observed. Because students will want to justify the various decisions they have made in the course of their client representation, they are likely to feel some personal stake in the standards and theories of lawyering that form during these discussions.[208]

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204. Bellow, *supra* note 66, at 379. The belief that experience can be an effective teacher reflects certain underlying assumptions. In Bellow's words:

> Basic to the claims of clinical teaching is the assumption that human experience involves patterns of meaning and realms of understanding that can be differentiated from each other, and that exhibit distinctive and characteristic methods, ideas and structures. That is, the way we think about and understand objects, life, mind, social reality from an observational and empirical perspective is very different from the way we experience the phenomenon aesthetically or as an outgrowth of subjective self-awareness.

Id. at 407 n.17.

205. *Id.* at 390-94.

206. *Id.* at 400.

207. *Id.* at 383 ("The knowledge that one will have to perform tasks in an unfamiliar environment produces an internally felt need for guidance for some framework within which he or she can make sense out of the experience, and cope with the anxiety unfamiliarity generates.").

208. *See id.* at 384, stating that:

> [Students] have confronted in concrete form some of the problems of choice and judgment basic to the role involved, and they have experienced the common human need for felt consistency and coherence in

Students may often represent people who present them with a melange of legal, personal, and institutional problems in an unsifted form.[209] As lawyers, students must identify and analyze these problems, thoroughly consider and evaluate an inventory of possible courses of action, decide on a course of action under conditions of uncertainty, plan for a variety of contingencies, and interact throughout the process not only with teachers and fellow students, but with clients, adversaries, witnesses, judges, court personnel, and other interested persons.[210] The success of this endeavor as pedagogy depends on the employment of a method of careful and sensitive review throughout the planning and evaluation process.

Such a review should encompass a scrupulous self-assessment to help students understand what has transpired and plan future conduct. Anthony Amsterdam has suggested that this self-assessment might involve students asking themselves a litany of questions,[211] including:

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their behavior. If the class discussion is oriented in these directions, the instructor will often find a group considerably less willing to ignore the precise applications of the theories and standards being advanced, and uneasy with explanations of behavior which carry implied criticisms of their conduct. In both these phenomena, there is considerable potential for the stimulation among students of further thought, analysis, and investigation.

Id. (footnote omitted).

209. *See* White, *supra* note 14, at 162, stating that:

> The new lawyer is surprised to discover that in practice no case ever comes to him as a clean-cut paradigmatic case, but always has uncertainties, ambiguities, rough edges and paradoxes built into it. This is so because the case comes from life, not from the exposition of a theory, and these are the qualities of actual human experience. To deal with the fact that circumstance and culture constantly change, the mind must have not a grid of established moves but the capacity to invent new moves . . . the capacities of an Odysseus, confident that he can meet a new situation with intelligence by focusing on what it actually is.

Id.

210. *See generally* Amsterdam, *Clinical Legal Education — A 21st-Century Perspective*, 34 J. LEGAL EDUC. 612 (1984) (proposal for the direction of legal educational reform in the latter part of the 20th century).

211. Amsterdam views these questions as the "points of entry" to kinds of reasoning essential to effective lawyering. *Id.* at 617. He designates three such kinds of reasoning "ends-means thinking," "hypothesis formulation and testing," and "contingency planning." *Id.* at 614-15. He also sees these questions as "the beginning of the students' development of conscious, rigorous self-evaluative methodologies for learning from experience — the kind of learning that makes law school the beginning, not the end, of a lawyer's legal education." *Id.* at 617.

Peter Margulies has pointed out that unless students ask themselves a rigorous set of questions about their experiences, they may end up learning inap-

> What were my objectives in that performance? How did I define them? Might I have defined them differently? Why did I define them as I did? What were the means available to me to achieve my objectives? Did I consider the full range of them? If not, why not? What modes of thinking would have broadened my options? How did I expect other people to behave? How did they behave? Might I have anticipated their behavior — their goals, their needs, their expectations, their reactions to me — more accurately than I did? What clues to these things did I overlook, and why did I overlook them? Through what kind of thinking, analysis, planning, perceptivity, might I see them better next time?[212]

Such reflection brings into consciousness the often inchoate, pre-conscious theories and principles by which the student is operating.[213] Only by bringing into consciousness and making explicit those theories that underlie action can the student observe, evaluate, and improve them.[214] Clinical education thus

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propriate and inaccurate lessons from those experiences. Such errors in judgment arise from the documented tendency for people to draw conclusions from an events' graphic characteristics that leave emotionally resonant impressions. These conclusions may derive more from prejudices than from genuine insight, because an event's less salient characteristics may often be more important in shaping careful conclusions. *See* R. NISBETT & L. ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT (1980), *cited in* Margulies, *"Who Are You to Tell Me That?": Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients*, 68 N.C.L. REV. 213 (1990).

212. Amsterdam, *supra* note 210, at 617.

213. Professor Kreiling states that deliberate human behavior is a consequence of a person's "theory of action." Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience Through Properly Structured Clinical Supervision*, 40 MD. L. REV. 284, 290 (1981). To identify problems of effectiveness in professional behavior, persons must articulate their theories of action, rendering them testable. *Id.* at 291. By observing their own behavior, they may discover an inconsistency between their "espoused theory" and their "theory in use," contributing to the problems of effectiveness. *Id.*

214. As Kreiling writes:

> Unless the professional can analyze his (often tacit) intellectual framework — can determine why he took such action and what results were produced by taking such action — he cannot learn significantly from his experiences. . . . The clinical experience provides a closely supervised setting in which the student can practice making his "theories of action" explicit. By requiring students to articulate their "theories of action" in recurring professional situations and by recording the way they actually behave in those situations, a system can be established for using the student's experiences to test his professional effectiveness.
>
> Once ineffective professional behavior has been identified, there is strong motivation to learn why it has occurred. The next step in the process of learning from experience, then, is to determine what problems caused the ineffectiveness. . . . [These are] "learning dilemmas". . . . The determination as to why professional behavior is ineffective is based on exposure to these learning dilemmas. . . . By

lays the foundation for lifelong self-education with future experiences providing the grist for inquiry.[215] Professor Kreiling

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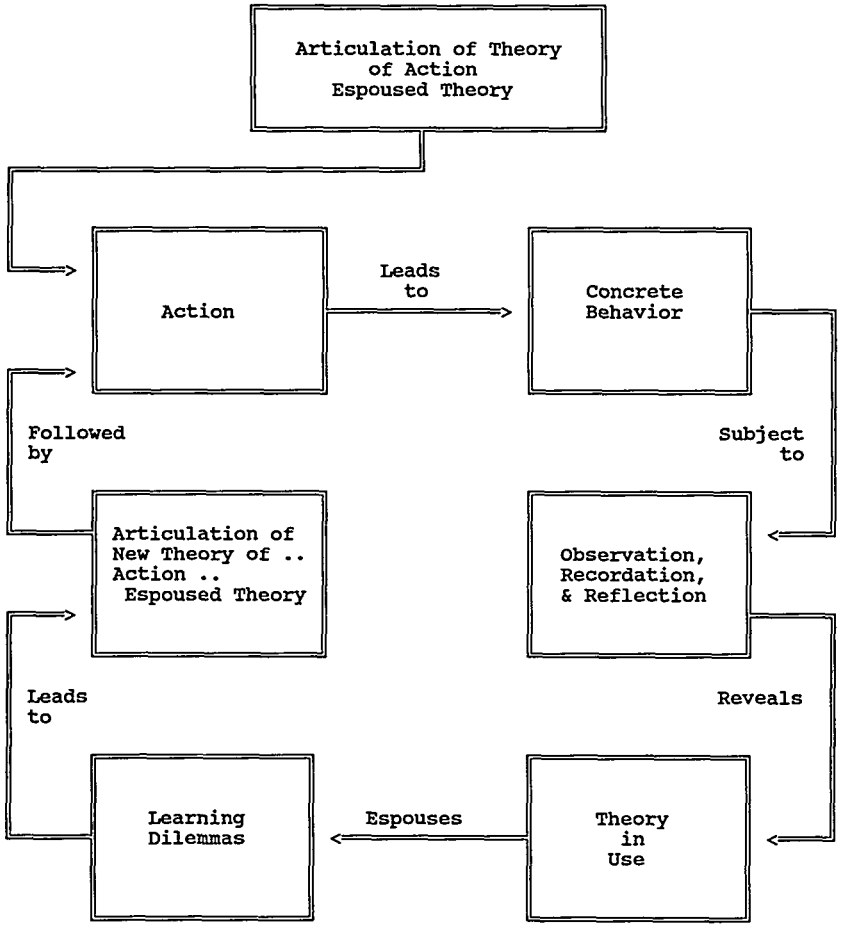
systematically articulating his proposed "theory of action" in a given situation, taking action, and then comparing the actual results with the expected results . . . the identification of inconsistencies among components of the theory should, under appropriate circumstances, provide motivation to modify one's "theories of action" and promote more effective professional behavior.

Id. at 289, 292-93, 295. Kreiling diagrams this process of learning from experience as follows:



Id. at 294. This appears to be a graphic depiction of what I have designated the "theory-practice spiral."

215. *Id.* at 284 ("Clinical education should . . . provide the students with a method for future learning from their experiences."). Some clinical educators view this clinical method as the skill of evaluation. *See, e.g.*, Tarr, *The Skill of Evaluation as an Explicit Goal of Clinical Training*, 21 PAC. L.J. 967 (1990).

describes the method as:

> how to develop theories of problem solving by utilizing established lawyering theory and by generalizing from experience; how to apply these theories in the actual performance of lawyering tasks; and how to analyze the results of performance in order to test the effectiveness of the action taken and thereby improve one's theory.[216]

He then describes the kind of classroom, feedback and supervisory relationship that supports this learning method,[217] drawing on interdisciplinary literature to support his claims.[218] Such a method is intended to develop, in the words of another commentator, a microtheory of lawyering.[219]

As an epistemological matter, a broader and deeper sort of comprehension may follow from integrating knowledge which has been absorbed not just through cognition, but through a jumble of impressions, sensations, feelings, intuitions, and actions, that are accessible at various levels of awareness. By critically reflecting on such a complex assortment of phenomena, as Creon had done by the close of *Antigone*, a person can come to a holistic, visceral understanding, a kind of meaning that can be felt and trusted because it makes good sense of experienced events.[220] To clinical educators, this explains why doing and knowing are so intimately related.

As in feminist theory, the relationship between doing and knowing challenges the traditional dichotomy between theory and practice.[221] As Bellow observes, the clinical method:

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216. Kreiling, *supra* note 213, at 288.

217. *Id.* at 297-336.

218. Kreiling's model of learning from experience is based largely on C. ARGYRIS & D. SCHON, THEORY IN PRACTICE: INCREASING PROFESSIONAL EFFECTIVENESS (1974). His prescriptions for the supervisor-student relationship rely heavily on C. ROGERS, ON BECOMING A PERSON (1961) and Rogers, *The Interpersonal Relationship: The Core of Guidance*, 32 HARV. EDUC. REV. 416 (1962). He also draws from a wealth of other sources, primarily in the fields of education and psychology.

219. *See* Menkel-Meadow, *supra* note 64, at 558.

220. *See, e.g.*, Bellow, *supra* note 66, stating that:

> [E]xperience produces a qualitative change in the mode and content of knowing, which cannot be replicated by the transmission of information. . . . The ways in which legal concepts and ideas are understood after they have been used in an interview or across a bargaining table "feel" differently in a sense that is not fully explained by the fact that they are more readily remembered.

Id. at 382.

221. In Bellow's words, clinical education has the "capacity to erode or at least foster examination of the rigid distinctions between theory and practice, fact and value, the subjective and the objective, which underlie the dysfunctions of modern social life." *Id.* at 378; *see also* D. BELL, THE REFORMING OF GENERAL EDUCATION 108 (1966) ("[T]he only knowledge of permanent value is

> assumes that the immediate and the remote, the concrete and the general are intertwined and can only be understood in human experience as such .... After graduation our students will be plunged into a welter of impressions, processes, roles and obligations. The most important questions they will face will not be concerned with the coherence of doctrine or the skills of case analysis, but with making sense of this experience, of coping with it, understanding it and growing within it, in the context of the particular professional role they have chosen to perform. The breadth, depth, and applicability of this understanding will be a function, in large part, of whether and how they have learned to learn.[222]

Like Bellow, many clinicians see the method of learning from lawyering, when properly conceived, as a method of learning to learn from experience.[223] Such a method constitutes one of clinical education's primary substantive goals.[224]

Even if clinicians endorsed the mastery of lawyering arts as their pedagogical objective, law students could not attain such mastery during the brief span of a clinical program. Students do inevitably learn some lawyering skills in the course of a clinical program, but more importantly, they learn the foundational skills for learning further skills in the future.[225] Moreover, the entire enterprise takes place in a client service context, rendering law not merely an object of study, but a vehicle for aiding, perhaps even empowering, the often disempowered persons who constitute the clinic's clientele. This service, in itself, offers a valuable lesson about the promise of law, even if such service provides means to other educational ends as well.[226] Indeed, the clinic's transmission of a critical

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theoretical knowledge; and the broader it is, the greater the chance it will prove useful in practice."); Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303, 1321 (1947) ("An interest in the practical should not preclude, on the contrary, it should invite, a lively interest in theory. For practices unavoidably blossom into theories, and most theories induce practices, good or bad.").

222. Bellow, *supra* note 66, at 394-95.

223. *See supra* notes 213-16 and accompanying text.

224. I have deliberately confounded the usual distinction between method and substance. I am not the first to suggest their interconnection. *See, e.g.*, Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1975); Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974). For a discussion of the similarities and differences between the meaning of "method" and the meaning of "procedure" in comparison with substance or substantive law, see Bartlett, *supra* note 95, at 843-44.

225. *See supra* note 215 and accompanying text.

226. I have no question about the value of exposing law students, many of whom have been remarkably insulated from these realities, to the ravages of class, caste, poverty, and race in our society and its pervasive relationship to the legal system. Nor is there much to be said against enlarging, through student practice, the severely limited opportunities for legal assistance available to low-income people, inso-

self-reflective model of lawyering precludes the treatment of cases in a mechanistic, formulaic manner and thus supports the implicit goal of improved client service by future practitioners.[227] This clinical model may be especially helpful to students who subsequently enter public interest settings that are too constrained and underresourced to provide adequate training.[228]

2. Learning from Synthesis

Just as dissecting the lawyer's role can build clinical theory, so too can clinical theory emerge from examining the lawyer's role in larger social structures. All clinical learning occurs in an interpersonal context, against a backdrop of doctrinal law and procedure, and within a framework affected by courts, administrative agencies, or other bureaucracies. The multidimensionality of the setting requires of students and teachers a:

> demanding synthesis of the personal, professional, subjective and empirical dimensions of lawyer behavior as well as the doctrinal, institutional, and process aspects of the legal system of which it is a part. [The clinical method] can be used to dévelop . . . appreciation of the complex interaction of rule, institution, personnel, process and social context that constitute the legal system. It can raise some of the most basic questions about the relation to the legal order of language, symbol, myth, and social consciousness . . . .[229]

Clinical settings, because of their integrative potential, can enlarge understanding of the traditional subjects of legal education: rule, doctrine, policy, and procedure.[230] The structuring of the traditional curriculum into an array of doctrinally-de-

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> far as this effort is not inconsistent with the educational aims of the program.
>
> The radical potential of the clinic method, however, lies in its capacity to deal with these problems in a more total way — in its basic intention to infuse law study with experience and knowledge of the legal system in operation.

Bellow, *supra* note 66, at 377-78.

227. Unnecessarily distinguishing between means and ends creates discomfort here. Service is both an end of clinical education and its means to other essential ends. The fact that service serves other ends does not undermine its importance, although the quantity of immediate service may be circumscribed by other educational needs. *See supra* note 203. The hope is that the quality of future service will be enhanced by the tragic present tradeoff.

228. *See* Bellow, *Turning Solutions Into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106, 117-21 (1977) (describing the problems of routinized legal services practice and offering solutions which can be reinforced by clinical training).

229. Bellow, *supra* note 66, at 396-97 (footnote omitted).

230. *See* Janus, *supra* note 2, at 463 (arguing that clinical education "helps

fined compartments can mislead students about the entangled reality of the lawyering process. Because clinics focus on this reality, a reality which requires knowledge and analysis of rules, doctrines, policies, and procedures, clinics can help to cure misunderstandings about the interrelatedness of these subjects to one another and to other processes. Further, clinics help to deepen understanding of principles of law and policy by providing greater insight into how such principles operate. Observing the relationship of principles-as-conceived to principles-in-action affords a more profound understanding than one can attain through textbook study of principles alone.[231]

Yet, as the observation quoted above suggests, the scope of the clinical promise is far broader. The clinic's contextualized approach to the study of law provides clinical participants with rich data that makes all manner of theoretical and interdisciplinary inquiry possible. Clinical participants can observe closely the structures of the legal worlds in which lawyers function, providing them with a vantage point from which to construct a macrotheory of lawyers' interactions with the legal system and with the world.[232] In developing such a theory, participants would "travel up and down the levels of generalization — moving from the concrete to the abstract and . . . back again."[233]

Such a theoretical project for clinical education illuminates yet again the intimate relationship between earth and sky.[234]

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students integrate the knowledge and skills they have learned in law school with their own values to become effective, ethically grounded lawyers").

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> [The clinical method] asks that the student be concerned, with larger units than typically organize and focus the law school experience. The student experiences the curriculum as a set of differentiated subjects and planes . . . . At a deeper level, law is presented as separated from other bodies of thought — history, philosophy, natural and social science. Even the affective and cognitive dimensions of knowing seem to be unconnected in the apparent exclusiveness of our concern with linguistic manipulation and logical rigor. Never are these aspects of the legal order and the functioning of human beings within it brought back into any totality, any sense of the whole. . . . The clinical method goes considerably further, providing an integrative focus . . . .

Bellow, *supra* note 66, at 395-96.

232. *See* Menkel-Meadow, *supra* note 64, at 556.

233. See Menkel-Meadow, *Two Contradictory Criticisms of Clinical Education: Dilemmas and Directions in Lawyering Education*, 4 ANTIOCH L.J. 287, 297 (1986) (claiming that clinics have the potential to generate macrotheory, but that clinicians have not emphasized it sufficiently).

234. I am grateful for this image to Graham Strong, from whom I borrowed it. *See* G. Strong, Panel on "Learning from Other Disciplines" 79, Materials Prepared for AALS Conference on Clinical Legal Education (June 6, 1990) (unpublished conference materials on file with author).

To truly understand the systemic structures in which lawyers participate, students would have to confront the "inarticulate conclusions about the nature of reality, of knowledge, and of language" that prefigure any legal issue,[235] and that reside beneath consciousness for many of us. In the words of Bishin and Stone:

> [A]lthough the lawyer may not always be aware of it, in his day-to-day tasks of counselling, planning and contending, he is engaged in activities that philosophy — as well as such related disciplines as psychology and sociology — has long sought to analyze and illuminate. . . . In view of this, it is curious that those concerned with law have not more fully exploited the wealth of available philosophical — and related theoretical — literature.[236]

The breadth of the synthesis suggested here, although a challenging one, is not an impossible dream, especially for those, like Bishin and Stone, who are attached to the notion that most persons are theoreticians.[237] To articulate and understand the theories on which they operate, such persons need only become involved in a process, like clinical education, that helps bring these theories into conscious awareness, where one can scrutinize them.[238]

Supplementing traditional law school education by embedding law in its context, clinics have the potential to transform the study of law into the study of a culture that deploys law for various purposes. History, philosophy, literature, and other humanistic disciplines can provide a new angle for viewing the legal skills employed, the legal order encountered, and the relationship of each to one another and to the wider social world.

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235. W. BISHIN & C. STONE, LAW, LANGUAGE, AND ETHICS: AN INTRODUCTION TO LAW AND LEGAL METHOD vii (1972).

236. *Id.*

237. *See* C. MACKINNON, *supra* note 41, at 102 (describing as a value of consciousness-raising methods that they make "everyone a theorist"). Gramsci might call such persons "organic intellectuals," although he did not seem to disperse the designation as widely as I am suggesting here. A. GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 332-33 (1971). Kohlberg and Gilligan viewed as philosophers all children and adolescents engaged in developmental struggle to determine how to live their lives. *See* Kohlberg & Gilligan, *The Adolescent as Philosopher: The Discovery of the Self in a Postconventional World*, 100 DAEDALUS 1051, 1071-72 (1971).

238. Speaking of interdisciplinary education generally rather than clinical education specifically, James Boyd White observed:

> An important consequence of this kind of study is that it would bring to the center of consciousness, where they could be studied and criticized, the assumptions underlying the culture of law and of our larger culture; this in turn might enable us better to perform our lawyers' functions of cultural criticism and transformation.

White, *supra* note 14, at 165.

3. Learning from Critique

Clinical education is not just integrative but critical. Although clinics offer fledgling lawyers the comfort that derives from a growing familiarity with the practice of law, they also seek to cultivate discomfort with the practice of law, a discomfort that derives from introspection and self-consciousness about the meaning and consequences of the professional behavior of oneself and others. Clinical educators urge students to draw on the experience of law practice and the synthesis of law and other disciplines that creates a larger context for these experiences, so that students, in turn, can take a number of additional steps: to appraise traditional lawyering practices and the theories that they embody, to develop normative views about the relationship of these theories and practices to standards of justice, and to improve this relationship where possible. These steps constitute the process of critique.[239]

Lawyers breathe life into legal rules via formal and informal means.[240] Robert Condlin urges scrutiny of "the low-visi-

239. I have drawn this definition largely from Condlin, *supra* note 65, at 48-49. Condlin argues that critique is the most important objective of clinical education. *Id.* at 47. I have deliberately fudged the issue of whether critique is method or objective by entitling this section "Learning from Critique" rather than "Learning Critique," as I have with "Learning from Synthesis," *supra* Section II. B. 2., and "Learning from Responsibility," *infra* Section II. B. 4. ("Learning from Experience," *supra* Section II. B. 1., has no alternate formulation.) I believe that synthesis, critique and responsibility are rightfully considered methods rather than objectives, because students learn how to do them by doing them. What is important about a student's critique is not so much what it contains, but that a student learns critical habits in the process. Likewise, it is important that students learn habits of synthesis and responsibility. My dispute here is with the distinction between method and objective (or substance), because the two are so integrally related. *See supra* notes 224, 227. Others disagree. *See* Barnhizer, *The Clinical Method of Legal Instruction: Its Theory and Implementation*, 30 J. LEGAL EDUC. 67, 71 (1979) ("[W]hile this article takes the position that key aspects of the learning of systems of professional responsibility and lawyer skills are the unique and vital role of the clinical method, these elements are not part of the definition of that method, but specific educational goals that can best be achieved through a careful use of the clinical methodology.").

240. *See, e.g.*, J. Charn & G. Bellow, Memorandum to the Michelman Committee, Harvard Law School, app. A, at 1 & n. 2 (Oct. 13, 1981), *cited in* Feldman, *On the Margins of Legal Education*, 13 N.Y.U. REV. L. & SOC. CHANGE 607, 626 n.56 (1984-85), stating that:

> For example, in every field of law, there are processes which nullify laws, rules and policies, as well as unstated norms and practices (the unofficial system) which create alternative policies and mandates. In every transaction — between lawyer and client, client and others, lawyer and lawyer, there are relationships which further shape and influence outcomes. Many of these transactions become sufficiently

bility ways in which lawyers amend, abrogate, and enforce the law, and in the process, determine much of law's meaning for persons who come in contact with it."[241] Condlin views critique as clinical education's raison d'etre,[242] and advocates its elaboration as the culmination of a clinical curriculum.[243] In his words:

> [Lawyer's] practices are amenable to theoretical elaboration, support multiple research agendas, and can be divided, categorized, and sequenced conceptually for purposes of instruction. In addition, they provide a distinct and relatively unexplored vantage point on the operation of the legal system from which new critical insights about law may be produced, and these insights in turn will have implications for the ways in which statutes are drafted and doctrines elaborated. . . . In studying lawyer-skill practices, teachers and students come to see how the individual actions of lawyers constitute and reconstitute legal rules, and how the legal system's kantian (rule/policy) and aristotelian (lawyer dispositional) halves fit together.[244]

> patterned to take on a law-like quality themselves. In our view, the so-called gap between law in the books and law-in-action . . . is grossly misleading. The differences are differences in kind rather than degree and much too complex to be captured by such a linear concept.

Id.

241. Condlin, *supra* note 65, at 48.

242. Condlin also views critique as the university's raison d'etre:

> Critique is a university's reason for being, its identifying characteristic, and the only one of its multiple functions it fails to perform at the price of being a university. . . . [C]ritique is the university's highest function, its aspiration, the source of its greatest potential and its occasional achievement and it remains the strongest basis of the argument for the university's existence.

Id. at 50 (footnote omitted).

243. *See id.* at 47 n.6, 74 n.77. Condlin believes that the clinical externship model provides the best format for pursuing critique, since externships would allocate oversight of the functions of lawyering and criticism to two different persons — the cooperating attorney and the professor respectively. *Id.* at 53-59. Although this might reduce certain role conflicts for the professor, if the goal is to inculcate habits of critique in young lawyers-to-be, shouldn't professors engage in both activities with students as a model for student behavior? Ultimately, Condlin's rationale for replacing the conventional clinic with a cooperating law office alternative founders on his failure to acknowledge that law professors can do simultaneously those activities that they urge and train young lawyers to do simultaneously. This is surprising in light of Condlin's emphasis on role-model emulation as the basis for clinical teaching of professional ethics. *See* Condlin, *The Moral Failure of Clinical Legal Education*, in THE GOOD LAWYER 317, 322-28 (D. Luban ed. 1984).

244. Condlin, *supra* note 65, at 48 (footnotes omitted). I interpret Condlin's reference to the Kantian aspects of the legal system to mean those aspects which involve rational moral and policy judgments as to those cases in which rules will apply. His reference to Aristotelian aspects of the legal system is to those aspects of judgment that depend on the inculcation of a particular way of behaving, a moral disposition. Further, the Kantian aspects refer to transcendent notions of rules and obligations whereas the Aristotelian aspects tie a

Critique is an essential clinical method because a normative perspective is inherent in all lawyering skills.[245] To understand the difference between an excellent lawyer and an unethical lawyer, Condlin explains, one must have a tacit normative framework. Otherwise, one could never draw a line between counseling and controlling, maneuvering and manipulating.[246] Learning to articulate one's tacit normative framework is a vital feature of clinical skills training, for it helps young lawyers to avoid falling hostage to the unarticulated norms of the prevailing practices.[247] Without such training, these lawyers may not develop the inclination to consider whether particular practices contribute to the furtherance or the frustration of justice.[248]

Because lawyers wittingly or unwittingly make political and moral judgments, good lawyers must evaluate their daily

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lawyer's morality to judgments specific to the lawyer's role. I was aided in this interpretation by reading Luban, *Epistemology and Moral Education*, 33 J. LEGAL EDUC. 636 (1983).

245. *See, e.g.*, Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469, 504 (1984) (theories of how society is structured and what it will allow precede lawyers' practical judgments and compromises).

246. *See* Condlin, *supra* note 65, stating that:

> [W]e do not call a person who fabricates evidence and obtains a favorable settlement as a result, skillful; we call him dishonest. . . . The concept of skill has no meaning outside an ever-changing and controversial normative context and it must be studied in that context to be understood. Political critique is a necessary not just interesting part of the study of skill . . . .

Id. at 52.

247. *Id.* at 53 n.24 ("[The critical clinical student] tries to understand why things are done as they are and enlarge his sense of what could be done, rather than internalize as habit what is commonly accepted."); *see also* Barnhizer, *supra* note 239, stating that:

> [P]erceptions of professional responsibility become distorted in response to the particular legal environment in which they exist. It is difficult enough to withstand these forces if the individual has already developed a clear and strong understanding of his . . . fundamental values. If the individual has not developed a workable system of responsibility, however, it will be virtually impossible to transcend the experiences. Because there are no standards by which to judge the rightness of professional behavior, the measure of responsibility will be that which is accepted generally.

Id. at 74.

248. *See* Condlin, *supra* note 65, stating that:

> One can have normative theories about the proper performance of lawyer practices, and theories about how lawyer practices contribute to the justice of the legal system as a whole. . . . The ability to judge day-to-day law practice against . . . standards of justice and fairness is an essential quality of a good citizen and a good lawyer.

Id. at 48, 50-51 (footnote omitted).

practice against conceptions of justice and fairness.[249] Rarely, however, is such an evaluative process explicit in the workplace. Once students graduate, if not before, they experience psychological, political, and financial pressures to assimilate themselves unthinkingly to conventional norms of conduct.[250] To transcend these pressures and become more autonomous actors, they must practice critical thinking skills at formative stages.[251]

To engage in such a critical process, one must develop a coherent perspective on the "nature of a fair and just legal system and the role of lawyer practices in operating and improving it."[252] Such a perspective need not represent a fully conceived normative system, but it should remain open to development in the light of new experiences.[253] Only through critical movement in a normative direction will lawyers achieve the capacity

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249. *See, e.g.*, Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 81-83, and sources cited at Condlin, *supra* note 65, at 51 n.19. For a critique of clinical education for largely failing to address the politics immanent in lawyering and for focusing too intently on the psychology of lawyering, see Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487 (1980) [hereinafter Simon, *Homo Psychologicus*]. For a clinician's reply that Simon's critique is unfairly reductive, see Menkel-Meadow, *supra* note 64, at 565 n.61.

250. *See supra* note 247; *see also* Barnhizer, *supra* note 239, at 73-74.

251. *See* Condlin, *supra* note 65, at 53, observing that:

> [C]ritique of lawyer practices is pursued for its contribution to the development of the individual — not to be unknowingly captive to received wisdom is to be more fully autonomous — because it is an essential element of a law trained person's completed world view, and as a foundation for reform of the incentive structures within which lawyer behavior operates.

Id.

Steven Hartwell conducted a modified "Milgram" experiment in his clinic, asking students to inform a "client" (actually a confederate of Hartwell's) that she should lie under oath in order to win her case. Deferring to authority in the clinical setting, most of the students transmitted this patently unethical advice to the client, just as Stanley Milgram's subjects continued to obey the experimenter's instructions to administer what they believed to be increasingly more painful electric shocks to people who were making "learning errors." *See* S. MILGRAM, OBEDIENCE TO AUTHORITY 20-21 (1974). Plainly, the development of moral reasoning benefits from a capacity to transcend the persuasion of perceived authority. Hartwell has experimented with pedagogical methods — including lessons in empathetic listening and assertiveness training — that promote this moral reasoning capacity. *See* Hartwell, *Moral Development, Ethical Conduct, and Clinical Education*, 35 N.Y.L. SCH. L. REV. 131, 141-43 (1990).

252. Condlin, *supra* note 65, at 48-49.

253. *Id.* at 49-50 ("These theories can be incomplete, tentative, or not wholly (or even in major part) original, as long as they are also coherent, intelligent, and genuinely open to further development.").

to consider and reconsider how they ought to conduct themselves and to imagine and reimagine alternative forms of conduct and better institutional arrangements. Because the legal profession is fraught with fundamental moral ambiguities that good lawyers must confront,[254] the process of critique is an essential lawyer's skill that clinical education helps to develop. Moreover, because the nature of legal practice implicates questions of social engineering and the pursuit of justice, clinics must participate in fulfilling legal education's obligation to examine models of justice in action.[255]

Law students, like most people, manifest interest in ideas of justice, fairness and equality, but they have few shared experiences from which to examine the meaning of these ideas.[256] By engaging in a supervised legal setting in which one's own and others decisionmaking infuses practical meaning into these ideas, students find a ground from which to soar toward crucial systemic questions. In this setting, such questions no longer seem airy irrelevances, but become vitally important to understanding one's experiences and developing personal commitment to one's work.

When clinical educators define the subject matter of clinical education this broadly, the relationship between professor and student necessarily changes. Clinical students and professors then will approach important theoretical questions, questions about which the professor has no claim to exclusive expertise or ultimate authority. In doing so, the professor and students will pool their observations and knowledge to join in a collective exploration. The clinic classroom thus becomes less rigidly hierarchical, a place for continual rethinking of the relationship between experience and theory in a genuine search for

254. Richard Wasserstrom's oft-cited essay formulates the two fundamental difficulties as those of manipulation and domination. Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975). As Wasserstrom states it, these problems arise from the fact that the duty of zealous representation in the lawyer-client relationship "renders the lawyer at best systematically amoral and at worst more than occasionally immoral in his or her dealings with the rest of mankind" and that the lawyer-client relationship is one in which "the lawyer dominates and in which the lawyer typically, and perhaps inevitably, treats the client in both an impersonal and a paternalistic fashion." *Id.* at 1; *see also* Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454 (arguing that a moral dilemma exists when a client's wishes do not meet with the attorney's approval or the attorney's assessment of the client's interests).

255. *See* Barnhizer, *supra* note 2, at 123-24.

256. *See* Bellow & Johnson, *Reflections on the University of Southern California Clinical Semester*, 44 S. CAL. L. REV. 664, 688 (1971).

understanding.[257]

4. Learning from Responsibility

Ethical reasoning is a specific kind of critical reasoning.[258] Professor Barnhizer has developed a list of concepts which law students must address to adequately understand professional ethics: ethical proscriptions, ethical philosophy, personal morality, professional role, institutional analysis, social consciousness, and systemic reform.[259] Students can intellectually attend to theoretical systems that explore these concepts, but "the traumatic impact of reality soon assaults much of the system," blurring any internalized understanding of personal behavior.[260] On the other hand, shouldering the burden of responsibility, as in clinical education, requires students to examine their personal values and the relationship of these values to their professional role, which, in turn, compels students to evaluate their professional responsibility to clients, legal institutions, and society.[261] Participating in events that require ethical judgments inspires students to scour the enumerated categories of ethical concepts for material that will assist them in con-

257. I do not claim that the clinic classroom becomes nonhierarchical, simply less hierarchical than a traditional law school classroom can sometimes be. *See id.* at 693-94; *cf.* Condlin, *Socrates' New Clothes*, *supra* note 201, at 223-26, 248-74 (describing a pattern of teacher manipulation and control in clinical supervision, despite claims to the contrary). Condlin's observations may represent failures of implementation rather than design. *See* Bellow, *On Talking Tough to Each Other: Comments on Condlin*, 33 J. LEGAL EDUC. 619, 620 (1983); Redlich, *The Moral Value of Clinical Legal Education: A Reply to Professor Condlin*, in THE GOOD LAWYER 350, 356-57 (D. Luban ed. 1984).

258. *See generally* J. PIAGET, THE MORAL JUDGMENT OF THE CHILD (M. Gabain trans. 1966). Whether ethical reasoning constitutes a unique kind of reasoning is unclear. I read many of the neo-Kantian ethicists to suggest that it is. *See, e.g.*, A. GEWIRTH, REASON AND MORALITY (1978); R.M. HARE, THE LANGUAGE OF MORALS (1952); J. RAWLS, A THEORY OF JUSTICE (1971).

259. Barnhizer, *supra* note 239, at 76-77.

260. *Id.* at 74.

261. *Id.* at 74-75. Kohlberg describes the psychological dynamics underlying such examination. When confronted with a situation that challenges their values, creating internal conflict about the appropriate response, people must examine their value structure and advance to a more developed moral stage in order to resolve the conflict. Experiencing the conflict is necessary to induce the dissonance that will lead to further moral development. *See generally* L. KOHLBERG & E. TURIEL, *Moral Development and Moral Education*, in PSYCHOLOGY AND EDUCATIONAL PRACTICE 456 (G. Lesser ed. 1971); RESEARCH IN MORAL DEVELOPMENT: THE COGNITIVE DEVELOPMENTAL APPROACH (L. Kohlberg & E. Turiel eds. 1973). Although Kohlberg's developmental theory may not be universally applicable, *see, e.g.*, C. GILLIGAN, *supra* note 30, at 18, these particular observations may have practical value.

structing explicit affirmative structures for guiding their professional behavior.[262]

To say that making students responsible is the best way to make them responsible is not the simple tautology that it appears. It means that actively taking responsibility contributes to the development of responsible character to a greater extent than any other approach including the study and analysis of ethics.[263] A person's response to a question about what she would do if she were responsible in a hypothetical situation is different from being responsible for acting in a real situation; not only because the latter situation engages a person at a more intense, purposeful, and consequential level.[264] A person ad-

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262. *See* I. SCHEFFLER, CONDITIONS OF KNOWLEDGE: AN INTRODUCTION TO EPISTEMOLOGY AND EDUCATION 103-04 (1965), stating that:

> Practice in professional education is misconceived if assimilated to the model of drill or the repeated study of standard cases. There needs to be room for having opportunities which will provide for the genuine exercise of students' judgment, as well as for critical reflection on the outcome and strategic principles of such judgment.

Id.

263. That law schools must undertake the responsibility to develop responsibility in students, to nurture the "natural cognitive and emotional capacities which express our moral nature," is widely accepted. *See* Richards, *Moral Theory, the Developmental Psychology of Ethical Autonomy and Professionalism*, 31 J. LEGAL EDUC. 359, 373 (1981). As Richards states:

> [D]oing nothing in the way of conscious moral education is not ethically neutral or liberally tolerant: it is not to take seriously the facts of moral development or the impacts of our educational policies on moral development. Ethical reasoning is a complex, delicately intricate, inestimably important human capacity which develops in response to certain kinds of favorable circumstances. Professional education, which educates the most powerful class of people in our society, receives these people at a crucial age in which, in response to the circumstances of professional education, they will or will not develop better capacities for ethical reasoning concomitant with their professional identity. I do not see how we can justifiably deny our active responsibility for results we so palpably shape.

Id. at 373-74.

264. *See* Condlin, *supra* note 65, observing that:

> [F]or most students direct experience will add nuance and sophistication; and for some it will make the questions real for the first time. . . . Until they are involved in such events, students do not take seriously the possibility that the events could happen, or become aware of all the factors involved in understanding and dealing with them.

Id. at 67.

Carol Gilligan has discerned gender distinctions in degrees of comfort with hypothetical problems:

> Hypothetical dilemmas, in the abstraction of their presentation, divest moral actors from the history and psychology of their individual lives and separate the moral problem from the social contingencies of its possible occurrence. In doing so, these dilemmas are useful

dressing a hypothetical description, even a highly particularized one, cannot fully grasp what "drives" the event[265] and is missing "the thousand intangibles" about the people and the events involved that establish the conditions for, and the constraints on, ethical judgment.[266] Accordingly, although students can construct what they consider the most just response to hypothetical ethical dilemmas, they may do so in an idealized fashion that bears little resemblance to how they would feel if responding to actual events.[267] Under these circumstances, their talk of what is just will be just talk.[268]

This view supports the claim that clinical education has

> for the distillation and refinement of objective principles of justice and for measuring the formal logic of equality and reciprocity. However, the reconstruction of the dilemma in its contextual particularity allows the understanding of cause and consequence which engages the compassion and tolerance repeatedly noted to distinguish the moral judgments of women. Only when substance is given to the skeletal lives of hypothetical people is it possible to consider the social injustice that their moral problems may reflect and to imagine the individual suffering their occurrence may signify or their resolution engender.
>
> The proclivity of women to reconstruct hypothetical dilemmas in terms of the real, to request or to supply missing information about the nature of the people and the places where they live, shifts their judgment away from the hierarchical ordering of principles and the formal procedures of decision making. This insistence on the particular signifies an orientation to the dilemma and to moral problems in general that differs from any current developmental stage descriptions.

C. GILLIGAN, *supra* note 30, at 100-01.

265. Condlin, *supra* note 65, at 67.

266. Luban, *supra* note 244, at 643.

267. As Luban has observed, the concerns of a student responding to a hypothetical dilemma may include:

> [T]rying to say what the teacher wants to hear, trying to sound smart, and trying to walk the line between seeming too ruthless and too tender in the eyes of her classmates. Even a student who wants to give honest responses to hypothetical moral problems can succumb to these subliminal pressures. And, supposing that she doesn't, she is left with *no* constraints on her judgment. The client is *not* a real person, nor are the adversar[ies] . . . nor is the case.

Id. at 643 (emphasis in original). In Barnhizer's words:

> Non-clinical methodologies cannot place the burden of responsibility and outcome squarely upon the individual student. They thus permit him to stop short of the reality of personal value systems and professional behavior, and allow the idealization of projected individual attitudes and professional responses.

Barnhizer, *supra* note 239, at 75 (emphasis omitted).

268. *See* Condlin, *supra* note 65, at 66-67 ("[I]f one is interested in a moral philosophy of lawyering it is necessary to deal with these questions in the first person. . . . Without the experience of acting in lawyer role moral philosophizing will be just so many words.").

cornered the optimal method for teaching and examining professional ethics.[269] Professors Condlin[270] and Luban[271] have explored the Aristotelian foundation for this claim. Aristotle's belief in an activist moral epistemology suggests that intellectual methods alone are inadequate for attaining a moral perspective.[272] Rather, Aristotle claimed that one comes to understand the principles that underlie one's actions only by reflecting on those actions.[273] Because actions flow from one's disposition to act in such a manner, developing a virtuous disposition, through repeated participation in virtuous activity, is an essential precondition to understanding virtue and developing moral judgment.[274] In other words, actively experiencing moral responsibility precedes understanding moral precepts and developing moral judgment.

For a law student, the process of internalizing a disposition for ethical lawyering involves observing ethical instructors and their manner of responding, and counseling response, to moral dilemmas that arise in the course of lawyering. By reflecting on the nature of these experiences with the instructors, the student can develop a principled perspective on behaving ethically as a lawyer. In Aristotle's words, "the virtues we get by first exercising them .... For the things we have to learn before we can do them, we learn by doing them."[275] The key to unrav-

269. *See* Barnhizer, *supra* note 239, at 71-72 ("[E]ffective use of the clinical method is the only presently available means of consistently facilitating learning of 'professional responsibility' in a meaningful, internalized way sufficient to form an affirmative structure capable of guiding behavior ....").

270. *See* Condlin, *Moral Failure*, *supra* note 243, at 323-24. Condlin also relies on the work of Erik Erikson in support of this claim. According to Condlin, Erikson asserts that although personality is established in young adults, identity choices are delayed by students' extended sojourns in protected educational environments. Late in their education, students desperately want role models, and professional identity is inscribed by emulation of these role models. In clinical settings, students have as a model an ethically scrupulous lawyer-supervisor, and they can experiment with their new identities under the supervisor's watchful eye. *Id.* at 322-23. Erikson's developmental theory underlines the efficacy of such an approach. In his discussion of Erikson, Condlin relies on Stone, *Legal Education on the Couch*, 85 HARV. L.REV. 392 (1971), and Watson, *Lawyers and Professionalism: A Further Psychiatric Perspective on Legal Education*, 8 U. MICH. J.L. REF. 248 (1975).

271. *See* Luban, *supra* note 244, at 647-56.

272. *Id.* at 650-51.

273. Condlin, *supra* note 243, at 323.

274. *See* Luban, *supra* note 244, at 651 ("[F]irst principles are arrived at by reflection upon activities we have already experienced pre-reflectively and internalized as dispositions.").

275. ARISTOTLE, NICOMACHAEAN ETHICS 2.1. 1103a32-1103b2, *cited in* Luban, *supra* note 244, at 653.

eling the seeming paradox of this passage is understanding the need for an ethical exemplar and instructor whom the novice can consult while performing the acts that inculcate his or her ethical disposition.[276]

To morally educate students, instructors must bring them up in ethical habits when the students are first encountering professional responsibilities and shaping a professional identity.[277] Only through an active process such as this, one that is often available only through a clinical experience, can students learn virtue. And only when students behaviorally experience virtue with sufficient frequency for it to become a disposition will they develop the ethical capacity to evaluate complex and ambiguous situations and exercise appropriate moral judgments.[278]

The intellectual activity involved in moral judgment is what Aristotle called "practical wisdom."[279] Practical wisdom is an ability to judge the particulars of a situation on the basis of a disposition informed by reflection.[280] Although general rules may inform this judging process, they cannot wholly govern it because one cannot treat the meaning of rules as forever fixed apart from the particular situations in which the rules apply. To the contrary, "the ultimate particular" must sometimes correct the general rules.[281] As Aristotle stated:

> [A]bout some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the unusual case, though it is not ignorant of the possibility of error. And it is nonetheless correct; for the error is not in the law nor in the legislator but in the nature of the thing, since the matter of practical affairs is of this kind from the start. When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right . . . to correct the omission . . . . And this is the nature of the equitable, a correction of law where it is defective owing to its universality.[282]

According to this perspective, one must reason from the particularities of a context to an ethical judgment. In this way, one can make a behavioral choice even when the values relevant to

276. Luban, *supra* note 244, at 653-54 (importance of being brought up in good habits).

277. *See supra* note 269.

278. *See supra* notes 272-76 and accompanying text.

279. *See* Condlin, *supra* note 243, at 324.

280. *Id.*

281. ARISTOTLE, *supra* note 275, at 6.8. 1142a27, *cited in* Luban, *supra* note 244, at 654.

282. *Id.* at 5.10. 1137b13-28.

the situation, as is often the case, are incommensurable.[283]

Aristotle's activist moral epistemology provides a philosophical defense of clinical education as a method of learning moral judgment from the experience of taking professional responsibility. The same Aristotelian conception of moral judgment that recommends clinical methods also supports and endorses the methods of individualized judgment that feminists advocate.[284] Although reached independently, the methodological choices of each movement embody similar philosophical principles and ethical goals.

III. SUMMARIZING COMPARISONS

> Active searching intelligence becomes joined to openness, to a willingness to be surprised and moved, in company with others.
>
> — Martha Nussbaum[285]

In the foregoing description of clinical methods, one hears the echo of feminist methods. This section moves beyond awareness of the echo and elaborates more systematically the hints of resemblance and distinction contained in the respective methodological descriptions of each movement. First and foremost, the methodologies of feminism and clinical education both emphasize, as the reading of *Antigone* illustrates,[286] direct personal experience as theory's starting point, as well as its returning point for testing and rebuilding. To reiterate the methodological premise of both movements, each conceives of the relationship between explanation and experience, theory and practice, in the shape of a spiral.[287]

A. USE OF EXPERIENCE

Clinical education has a predominantly pedagogical identity, generating considerable attention to the learning process.

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283. Luban, *supra* note 244, at 655; *see also* T. NAGEL, *supra* note 147, at 134.

284. *See supra* note 146 and accompanying text ("feminist practical reasoning" as Aristotelian-style deliberation joined with consideration of multiple perspectives).

285. M. NUSSBAUM, *supra* note 25, at 72.

286. *See supra* Section I.

287. *See supra* notes 61-62, 66-67 and accompanying text. In *Always Coming Home*, Ursula LeGuin's science fiction vision of future society, all structural and sculptural forms take the shape of a spiral. U. LEGUIN, ALWAYS COMING HOME (1985). In LeGuin's world, the spiral is the "inexhaustible metaphor . . . the visual form of an idea which pervade[s] the thought and culture." *Id.* at 419, 515. Thanks to Clark Cunningham for directing my attention to this novel.

In the interest of effective learning, clinical students engineer and participate in events which they carefully analyze, soon thereafter, and others who observed or participated in the same events may join in the examination. Feminists, on the other hand, though concerned with the learning process, generally do not identify with pedagogy in the same way as clinical educators. Without the demand of short-term learning objectives, feminists rely on the delayed retelling of experience to those who may or may not have shared analogous events, but who rarely shared the actual events.

Feminists rely on the consciousness-raising process of storytelling about a broad range of life experiences as one source of experiential data.[288] Clinic educators and students rely on a narrower band of experience, their own engagement in professional work, as their primary source of data.[289] Clinic students, for purposes of learning, deliberately choose this band of experience, which they could otherwise avoid or postpone. Feminists, on the other hand, generally examine their own and others' unavoidable, everyday experiences for purposes of learning.[290]

Feminists generally place more importance than clinicians on acquiring second-order experience, that is on enlarging personal experience by seeking out stories of others' experiences[291] and discussing these stories in group settings.[292] Although a clinical classroom may sometimes resemble this feminist process, dressing for a time in consciousness-raising garb, clinics attend primarily to first-order experience, the students' direct involvement in events. Feminist methods of interpreting experience also tend to include more group involvement and feedback than do clinical methods of interpretation. Inquiry into a clinic student's experiences often occurs in a community of two, in a discussion between supervisor and student.[293]

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288. *See supra* Sections II. A. 1. and II. A. 2.

289. *See supra* Section II. B. 1.

290. *See, e.g., supra* text accompanying notes 99-104.

291. *See, e.g., supra* note 151 and accompanying text.

292. *See supra* notes 105-06 and accompanying text.

293. *See supra* note 208 and accompanying text. Of course, some of these discussions would take place in the clinic classroom with all of the clinic participants involved, but others would occur in individual supervisory meetings. For an argument that clinical teachers should remove all that is pedagogically feasible from the supervisory interaction and place it in the classroom setting and elsewhere, see Keynote Speech by Anthony Amsterdam, AALS National Clinical Teacher's Conference (May 17, 1986) (unpublished text of speech on file with author).

Despite these distinctions, each movement uses its experiential data similarly, generating insight by asking questions that examine the meanings and implications of the data. The movements are alike in the essential authority that they accord to the data of experience in their respective intellectual endeavors.[294]

B. ROLE OF AFFECT

Because experience contains both cognitive and affective content, exploring an experience fully requires exploring not only its cognitive, but also its affective dimensions. Feelings often provide windows to thought, and analyzing the causes and consequences of particular affective reactions often is a valuable step toward comprehending experience. When feminism and clinical education claim that experience precedes explanation, and that explanation must remain open to experience, they are tacitly recognizing the role of affect in experience and, therefore, in human understanding.[295] Feminists and clinicians, in their respective settings, devote time to bringing this role to the surface, rather than submerging it, in order to facilitate understanding.[296]

C. INTERPERSONAL DYNAMICS

One reason that experience inevitably includes cognitive and affective dimensions is that experience generally occurs in an interpersonal setting, and other persons arouse in us both cognitive and affective responses. Because feminists recognize the political content of personal interaction, they counsel attention to the social identity and experience-based points of view

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294. The method of inquiry into experience has influenced a number of disciplines. *See* A. SCHUTZ, THE PROBLEM OF SOCIAL REALITY (1967), stating that:

> In philosophy, literary criticism, psychology, linguistics, and the social sciences, there is an emerging concern with the world as lived and perceived .... Linked to this is an interest in the symbolic constructs people use to make sense of their experience. Too, there is a preoccupation with 'common sense reality' and the structures of meaning that are shared in particular cultures.

Id. at 55 (footnote omitted).

295. Although feminists recognize the role of feelings in developing understanding of self and the world, they do not claim that feelings are an autonomous, unmediated source of understanding. Rather, they recognize the influence of social construction on emotion as well as cognition. *See* C. MACKINNON, *supra* note 41, at 52.

296. *See supra* notes 162, 220 and accompanying text.

of the persons who are interacting, as one contribution to a full understanding of the events that the interaction engenders.[297] Although the standard clinical vocabulary does not include explicitly political language to describe the interpersonal dynamics of law practice,[298] clinicians frequently study the nature of these dynamics in at least implicitly political terms, and view such study as essential to conscious participation in, and careful evaluation of, the events that transpire.[299]

D. HIERARCHY AND COLLABORATION

Recognition by clinicians and feminists of the socially charged quality of interpersonal dynamics has consequences for the implementation of their respective methods. Clinical educators not only attend to relationships created by a legal event such as the attorney-client relationship, but they consider the student-teacher relationship as well.[300] Because clinical teachers and clinical students are involved in a collaborative enterprise, and because they jointly consider and decide issues that the teacher did not preconceive, the power in their relationship is less imbalanced than it can be in many teacher-student relationships.[301] Although the teacher's evaluation of students and her insistence on the completion of certain lawyering tasks essential to effective representation inevitably retain hierarchical overtones, other more egalitarian features of the clinical process diminish their impact.

Likewise, feminist teaching retains as few aspects of authoritarian control as possible. Feminist teachers endeavor to create a cooperative classroom climate that welcomes students and other persons to share their life experiences as the basis for further inquiry and speculation.[302] In so doing, the feminist classroom recreates, in part, the collaborative, questioning spirit of the consciousness-raising method.[303] For feminists, the

297. *See supra* note 120 and accompanying text.

298. For a criticism of clinical education on this score, see Simon, *Homo Psychologicus*, *supra* note 249, at 526-31.

299. *See supra* notes 209-12 and accompanying text.

300. *See, e.g.*, Condlin, *Socrates' New Clothes*, *supra* note 201 (exploration of the relationship between student and teacher in a clinical instruction setting).

301. *See supra* note 257 and accompanying text.

302. *See, e.g.*, Cain, *Teaching Feminist Theory at Texas: Listening to Difference and Exploring Connections*, 38 J. LEGAL EDUC. 165 (1988). Although not all feminists would conduct a class in the manner described, Cain offers one feminist approach.

303. *See supra* notes 105-06 and accompanying text.

teaching medium has ethical weight and is part and parcel of the learning message.[304]

Because first-order engagement in lawyering is the central feature of clinical curricula,[305] clinicians need not work as hard as feminists to shape a climate that invites personal experience into the learning inquiry. As a result, clinicians are more likely than feminists to view the collaborative exploration of the meaning of experiences as indigenous to their teaching enterprise, rather than as a conscious outgrowth of an ethical choice.[306] Nevertheless, many clinicians view the less hierarchical, more cooperative nature of clinical programs as an important contribution to law school education.[307]

E. INTERDISCIPLINARY INQUIRY

Feminists and clinicians resist the compartmentalization of ideas that impedes awareness of their interconnection, and view wide-ranging thought as essential to truth-seeking. Consequently, both have adopted interdisciplinary methods.[308] Each movement engages the services of many disciplines to further understanding of their own and others' concrete observations and experiences.

Feminist legal thinkers can locate interdisciplinary assistance with relative ease because scholars who identify their work as feminist and share similar values and approaches are at work in virtually every field. To the contrary, clinical educators do not constitute a readily identifiable, cross-disciplinary movement. Because the work of clinical legal educators has no tidy analogue in other disciplines, legal clinicians comb other disciplines for whatever assistance they can find. For clinicians, exploring the relationship of law to society requires such assistance, just as for feminists, comprehensively grasping the pervasive impact of socializing forces such as gender requires interdisciplinary treatment. Real life, the focus and source of

304. Marilyn Webb observes that if feminist teachers recreated hierarchy within the classroom, their analysis would be "devoid of form." Webb, *Feminist Studies: Frill or Necessity?*, in AND JILL CAME TUMBLING AFTER: SEXISM IN AMERICAN EDUCATION 410, 412 (1974).

305. *See supra* note 204 and accompanying text.

306. *See supra* note 257 and accompanying text.

307. *See, e.g.*, Bellow & Johnson, *supra* note 256, at 694.

308. *See supra* notes 98, 232-36 and accompanying text. Carrie Menkel-Meadow prefers the term "transdisciplinary," suggesting that it connotes a synthetic endeavor beyond the claims of any single discipline to a greater extent that the words "interdisciplinary" or "cross-disciplinary." *See* Menkel-Meadow, *Durkheimian Epiphanies*, *supra* note 75, at 108 n.71.

each movement's analysis, suffers too much distortion when viewed though a single disciplinary prism. Rather, understanding and improving real lives compels careful synthesis of all trustworthy knowledge, no matter its name or disciplinary address.

F. CONTEXTUAL REASONING

The Aristotelian practical reasoning process employed by each movement, moving as it does from specific to general, links the particulars generated and examined by clinical and feminist methods to the conceptual insights of many disciplines.[309] Moreover, Aristotelian-style reasoning links these particulars to each movement's normative concerns. Clinicians and feminists worry, as did Aristotle, about the outcomes produced by applying principles to a limited factual context rather than developing a full contextual understanding before rendering judgment.[310]

Attention to context means that feminists and clinical participants must explicitly acknowledge as relevant pieces of the context the norms they bring to the details of events. As feminists and clinicians have indicated, only by examining their normative structures can people truly comprehend and evaluate their behavioral choices. Acknowledging one's normative inclinations as a facet of the exercise of judgment conforms with the feminist's concern for candor in decisionmaking and for persistent appraisal of the soundness of one's judgment.[311] This self-conscious examination also conforms with the clinician's concern for vigilant attention to the ethics of lawyering practices.[312]

G. CRITICAL INQUIRY

Critique is inherent in the feminist enterprise. Feminists closely scrutinize the norms and ideologies embodied in institutional arrangements and compare these norms to their own ethical values.[313] Although fewer clinical scholars have risen to this challenge, such scrutiny is inherent in the clinical project as well.[314] No one concerned with the power allocations in

309. *See supra* notes 146, 279-80 and accompanying text.
310. *See supra* notes 281-82 and accompanying text.
311. *See supra* notes 164, 169-70 and accompanying text.
312. *See supra* note 263 and accompanying text.
313. *See supra* notes 104, 138 and accompanying text.
314. The time demands of clinical teaching pose an obvious hurdle to the

legal process can avoid such critical institutional assessment.[315] Taking this obligation seriously frees thinkers to envision and implement better institutional choices.

For feminists and clinicians, the need to consult the subtleties of varied experiences and a broad array of knowledge sources emerges from the urgency of knowing. Both clinicians and feminists find more at stake in this quest than intellectual integrity alone. The quality of living itself is the weight in the balance. Clinicians are deeply concerned with the conditions that trigger the legal process, with the consequences of legal process for their clients, and with the effect of legal process on all who encounter it. Feminist legal thinkers are concerned with these issues as well, because they are issues that implicate trenchant questions of fairness, justice, and equality. The concern with consequences, and with concepts that may generate better consequences, is an animating force of each movement.[316]

H. MORAL JUDGMENT

From an Aristotelian perspective, feminist methodology and clinical methodology each represent a species of activist moral philosophy. Both movements view engagement in an ethically-conscious practice as a prerequisite to the knowledge and development of ethical judgment. Although the practices of each movement are not equivalent, each conceives of an ethical practice as involving engagement in activity in which one learns reflectively from and with others. Although perhaps eliciting and attending to somewhat divergent details, each views reasoning from the details of real events to principled resolution as the appropriate manner of engaging and developing moral judgment.[317]

Insistence on contextual development does not undermine the capacity of feminists and clinicians to make moral judgments. Rather, this is the feature of feminist and clinical methods that makes moral judgment possible. It is in this sense that

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elaboration of such clinical scholarship. Nevertheless, critique is inherent in the clinical project, and to some extent, this will be reflected in its scholarship as well. *See, e.g.*, Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459 (1989) (discussing communication issues involved in the lawyer-client relationship); Ellmann, *Lawyering for Justice in a Flawed Democracy* (Book Review), 90 COLUM. L. REV. 116 (1990).

315. *See supra* notes 245-46 and accompanying text.

316. *See supra* notes 174, 252 and accompanying text.

317. *See supra* notes 198, 263 and accompanying text.

feminists and clinicians, while ethically scrupulous, are the opposite of ethical relativists.[318] They have made a moral judgment that moral judgments must be as carefully and flexibly tailored as possible to actual lived situations.[319] In other words, feminists and clinicians require elaborate knowledge of the many-faceted realities and novelties of a situation before passing judgment and taking action.[320] Feminists and clinicians do not use their sensitivity to the harm that faulty judgments can unleash to evade making judgments, but to highlight the importance of taking extraordinary care in developing the requisite knowledge from which to undertake the task of judgment.[321]

IV. BREAKING BOUNDARIES

> [T]he knowledge with which a true education is concerned is never repeatable data, but knowledge that entails a use or activity — a knowledge of practice that is a kind of action, including a kind of invention or creation. The practice of law is not the application of doctrine learned in law school to the facts of a client's case, for in one's practice the doctrine must be learned — and that means rethought, reconstructed — over and over again.
>
> — James Boyd White[322]

Despite apparent differences in form and content, feminism and clinical education share a striking methodological likeness. The extent of the resemblance is surprising in that each movement has evolved largely without reference to the other.[323] Accordingly, one may ask what each movement could now gain by explicitly considering the potential contributions of each to the other. Having examined the existing linkages,

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318. Martha Minow and Elizabeth Spelman see the ethically scrupulous as "epistemologically humble." Minow & Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1638 (1990). This epistemological humility leads to an attention to complexity and detail, particularly concerning the structures of domination in society, that "can provide grounds for judgment of good and evil and for descriptions that enable judgments." *Id.* at 1633.

319. *See* Friedman, *Care and Context in Moral Reasoning*, in MORAL THEORY, *supra* note 91, at 190, 203 ("[A] responsiveness to contextual details and a willingness to alter moral judgments depending on the context does not . . . imply an abandonment of moral principles."); Held, *Feminism and Moral Theory*, in MORAL THEORY, *supra* note 91, at 111-12 ("The tasks of moral inquiry and moral practice are such that different moral approaches may be appropriate for different domains of human activity.").

320. *See* Friedman, *supra* note 319, at 203 ("[S]ensitivity to contextual detail . . . need only be associated with . . . a worry that one's principles are too *narrow* to deal with the novelties at hand." (emphasis in original)).

321. *See* Minow & Spelman, *supra* note 318, at 1638-39.

322. *See* White, *supra* note 14, at 161.

323. *See supra* note 75 and accompanying text.

we have now reached an appropriate moment to undertake such consideration. What are the implications of applying feminist methods more directly to clinical education? Conversely, what are the implications for feminism of using clinical methods? How would each profit by taking the other more seriously? And how would legal education profit in the process? I will provide some preliminary responses to these questions in the hope of generating the promising dialogues between feminists and clinical educators that have yet to occur.

A. WHAT FEMINISM ADDS TO CLINICAL EDUCATION

Because clinical education employs relatively inexperienced lawyers on cases of considerable importance in people's lives, clinical educators are rightfully attentive to issues of effective lawyering technique. The danger is that clinical education will become mired in the transmission of technical skills, without attending to the inherent normative content and consequences of lawyers' technique.[324] Another danger is that clinical educators will focus so intently on the unique demands of each of a wide variety of cases that they will elide the large cultural structures that influence and explain the patterns of results that emerge.[325] That clinical education has, at times, realized these dangers reinforces its caricature, contrary to the image presented here, as an anti-intellectual enterprise.[326]

Clinic students' perceptions, judgments, strategies, and communications as lawyers — the components of lawyering technique — may differ qualitatively from their clients' perceptions, judgments, strategies, and communications. In part, these differences may result from the fact that law students typically come to clinics from different race, culture, and class backgrounds than their indigent clients. Students and clients also may differ on criteria such as gender, physical health, and

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324. *See supra* notes 245-48 and accompanying text.

325. This danger is related to the concern expressed by Cornel West that some philosophical pragmatists, particularly Richard Rorty, have used their focus on contextual detail to avoid patterns of power relations between races, classes, and genders. *See* C. WEST, THE AMERICAN EVASION OF PHILOSOPHY: A GENEALOGY OF PRAGMATISM 207-08 (1989). For a thoughtful glimpse at this aspect of West's work, see Minow & Spelman, *supra* note 318, at 1612-15.

326. *See, e.g.*, Barnhizer, *supra* note 2, at 94 ("For clinical faculty to become a legitimate part of the intellectual life of the university, they must release the shackles of their latent anti-intellectualism."); Janus, *supra* note 2, at 464 (suggesting that the previous curriculum of William Mitchell College of Law focused on training practicing lawyers and was neither academic nor intellectual).

mental health. These powerful socializing forces systematically influence what people come to know and understand about law, ethics, justice, and the world. As a consequence, the student lawyer's knowledge, like all knowledge, is partial and value-laden, and by uncritically applying technical skills that do not account for such structural influences, the student lawyer will likely reproduce the dominant and distinctive world view at the expense of the client's.[327] Feminist thinkers would rivet their attention on the impact of professional interaction across powerful socially constructed divides. Their keen sensitivity to uses of power and their sharply refined analyses of structures of dominance would bolster clinical education's capacity to identify and address the technical and ethical problems that these structures create.

If clinical education borrowed directly from feminist methods, it would gain an enhanced appreciation of the existence and consequence of multiple perspectives in a profoundly stratified world.[328] Although clinical educators have not ignored this facet of the clinical experience,[329] neither have they taken good advantage of the sophisticated feminist literature on the meaning of such differences, the methods for discovering the perspectives of those unfamiliar to us, or the moral imperatives of doing so.[330] Such literature might help students to interpret both their affective and cognitive reactions to their clients, reactions that may influence a student's behavioral choices and assessments of the case.[331] Feminist literature also may further

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327. *See, e.g.*, Alfieri, *The Politics of Clinical Knowledge*, 35 N.Y.U. L. REV. 7, 15 (1990) ("The notion of generalizable technique susceptible to universal application overlooks diverse configurations of client class, gender, and race. Because these configurations represent alternative constructions of client identity and world, their omission silences whole communities of voice and story.").

328. *See supra* note 148 and accompanying text.

329. *See, e.g.*, Eyster, *Analysis of Sexism in Legal Practice: A Clinical Approach*, 38 J. LEGAL EDUC. 183 (1988) (discussing approaches to addressing sexism within the context of a civil litigation clinic). Clinicians have also analyzed the meaning of differences among their students and the impact on lawyering practices of the underlying negative attitudes of others. *See, e.g.*, Scarnecchia, *Gender & Race Bias Against Lawyers: A Classroom Response*, 23 U. MICH. J.L. REFORM 319 (1990) (discussing various methods available in a clinical setting for teaching students about gender and race bias).

330. *See supra* notes 151, 191 and accompanying text.

331. Condlin points out, for example, that students often do not believe, until they feel it happening, that "strong personal feelings could affect their level of effort, or that they would not probe deeply to discover truth if it would jeopardize other strategic objectives." Condlin, *supra* note 65, at 67.

Barnhizer observes that clinical supervision involves "extremely sensitive

sensitize students to how their clients may be perceiving them and the legal process of which they are a part, and how these perceptions can affect their relationship. Deeper knowledge of these dynamics may engender insight into ways of facilitating communication across apparent chasms.[332]

The construction of a legal process in which an attorney speaks in the client's stead creates an instrumental need for an attorney to discover how the client understands the situation that precipitated the legal proceeding and how the client wishes to portray that situation in a public forum. If, as feminists assert, one's view of the world is related to one's power in the world, such that what one sees depends, in part, on where one

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matters of student attitudes, biases, and basic values" as they affect representation and notions of professional responsibility. Barnhizer, *supra* note 239, at 104. This is necessary because:

> Many students begin their clinical practice with romanticized ideas about their clients, projecting some of their own values and expectations upon them. Other students come into the clinical process with preconceived negative stereotypes regarding types of clients and/or cases. In the first setting, when the clients do not respond to the students' defined frames of political and social consciousness, resentment, rejection or a rationalized depersonalization of that particular client or group can occur. Students coming into this specialized educational experience with strongly developed racial, ethnic, educational and social prejudices will, when left solely to naked experience, find many reasons for affirming these stereotypes through cross-cultural contacts.

Id. at 94. Barnhizer then provides an extended example, replete with transcripts, in which a student's racial prejudices seem to be affecting his negative judgment about the strength of his client's case, and raises questions about appropriate supervision under these circumstances. *Id.* at 111-24. Feminists might add to Barnhizer's description an acknowledgment that the supervisor's values, expectations and biases must be addressed in the clinical process as well, because all of us are influenced at least unconsciously by stereotypes. *See* Minow, *supra* note 40, at 65.

332. Lucie White's article represents such an effort, speculating retrospectively about her client's experience of the case and about the remedial possibilities for affording her more meaningful future participation in the attorney-client relationship and in the legal process more broadly. *See* White, *supra* note 107.

Clinical education adds another layer of complexity to this analysis in that a relationship forms between clinical teachers and student-attorneys who hold, at least in the law school world and perhaps in the larger world, different social locations. The feminist literature on power relations, multiple perspectives, and cross-cultural communication would have direct application to the teacher-student relationship as well. Although this relationship is not the primary focus of clinical education, its dynamics must be addressed in order to facilitate effective pedagogy within the primary learning project. This important topic deserves more explicit discussion than I have been able to afford it in this Article.

stands,[333] then understanding the respective social locations of clinic participants becomes an important piece of undertaking and understanding client representation. If knowledge is always situated, knowing how to "represent" a client — in both familiar senses of the word — requires an attorney to understand the client's situation, broadly defined.[334] Absent a conscientious effort to acquire such knowledge and awareness of the difficulties of doing so, attorneys are likely to fall prey to unexamined assumptions that their understanding of the world coincides with their clients' understanding, an assumption that negates the clients' humanity.[335]

Reflecting on the power relations between attorney and client and the different backgrounds from which each has come to know the world is the students' first step toward comprehending how their clients cognitively and emotionally perceive the world. Students might then devise remedial measures in an attempt to vault the barriers that inhibit their ability to see the world through the eyes of someone whose experiences and interests they do not share. Feminist methods, such as narrative and consciousness-raising, offer students help in stretching their perspectives which, in turn, opens possibilities for examining and improving the quality of attorney-client relating.[336]

Every client comes to an attorney with a story and receives cues on which aspects of the story the attorney finds relevant

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333. *See supra* note 89 and accompanying text.

334. Both familiar senses of the word refers to the typical usages of "representation" in lawyering, indicative of advocacy on someone's behalf, and in the arts, indicative of a portrayal of someone. As Edward Said writes, representations can "bear as much on the representer's world as on who or what is represented." Said, *supra* note 122, at 224.

Clark Cunningham describes how the representation involved in lawyering can mean simply a "re-presentation" of the client's words, or it can mean the creation of a representation of a client, the latter bearing more closely on Said's usage. Cunningham, *supra* note 314, at 2460-61. Cunningham discusses the dilemmas and limits of each version of representation, preferring instead a notion of lawyering as translation, even of lawyering as writing subtitles to a foreign film. These alternative conceptions signify that two persons — legal decisionmaker and client — are speaking the same experience in different languages after the client's lawyer has made the nuances and unfamiliar meanings of each language known to the other speaker. *Id.* at 2482-94. Each of these conceptions of representation, even the least creative notion of "re-presentation," requires a wealth of information about the client's life and circumstances.

335. *See* Spelman, *supra* note 194, at 161 ("When you presume, you are not treating me as the person I am.").

336. *See supra* note 188 and accompanying text.

and plausible.[337] The assessments implicit in the attorney's cues, however, assume a particular audience with a particular perspective. Relevance and plausibility are contingent characteristics, dependent on one's world view.[338] Moreover, the world view from which such an attorney is operating is likely the view embedded in the dominant legal system and may not be the view that captures or organizes the meaning that the client ascribes to the story.[339] Accordingly, the likelihood of the

337. For examples of this phenomenon at work, see Cunningham, *supra* note 314, at 2463-69, and White, *supra* note 107, at 21-32.

338. *See, e.g.*, W. BENNETT & M. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE 171 (1981) ("People who have different understandings about society and its norms may disagree about the plausibility of a story. . . . If legal facts are reconstructed as stories whose plausibility depends on understandings drawn from experience, then [those] who come from different social worlds may disagree about the meaning and plausibility of the same stories."); *see also* Minow & Spelman, *supra* note 129, stating that:

> The factfinder asks which version is more plausible, and which is more compelling. The answers depend on more than the tests of internal coherence or logical consistency. These judgments emerge from intuitions that may express both shared understandings in the community and understandings contested by other members of the community.

Id. at 47.

For an argument that legal reform occurs via expanding notions of relevance, see Bartlett, *supra* note 95, stating that:

> The expansion of existing boundaries of relevance based upon changed perceptions of the world is familiar to the process of legal reform. The shift from *Plessy v. Ferguson* to *Brown v. Board of Education*, for example, rested upon the expansion of the "legally relevant" in race discrimination cases to include the actual experiences of black Americans and the inferiority implicit in segregation. Much of the judicial reform that has been beneficial to women, as well, has come about through expanding the lens of legal relevance to encompass the missing perspectives of women and to accommodate perceptions about the nature and role of women. Feminist practical reasoning compels continued expansion of such perceptions.

Id. at 863 (footnotes omitted).

Using Gilligan's characters and images, *see* C. GILLIGAN, *supra* note 30, Paul Spiegelman extends this argument to legal education:

> A major source of the web imagery's power to energize education is in the expanded notion of relevance Amy's web engenders. Because Amy's web is generated from context and experience, she receives a wider spectrum of input than Jake. . . . Amy's wider perspective can make a genuine contribution to the teaching of doctrine, analytical rigor, and theory.

Spiegelman, *Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web*, 38 J. LEGAL EDUC. 243, 255 (1988).

339. *See* Spiegelman, *supra* note 338, at 255-56; *see also* White, *supra* note 107. White's story of Mrs. G. illuminates how lawyers can distort the meaning of a client's experience by translating it into a narrative easily recognized by

attorney comprehending the client's world is diminished considerably if the attorney assumes, probably unconsciously, a particular world view, translates the client's story into its terms, and overtly or subtly conveys this strategy to the client.[340]

To understand how an attorney might better hear a client's story, feminists have looked to anthropology and sociolinguistics. A recent article by Lucie White draws on scholars in these fields who have documented marked differences in the language practices, and in the cultural beliefs about the speech, of dominant and subordinated groups.[341] These scholars found that members of dominant groups adopted a crisp, logical, declarative speaking style, whereas the members of subordinated groups chose to speak in a deferential, ambiguous, hedging manner.[342] Dominant speakers, having the power to influence others, convey certainty. In contrast, subordinated speakers convey tentativeness, in recognition of their limited influence and in an attempt to negotiate non-threatening encounters with more powerful actors.[343]

White reports on the work of anthropologist William O'Barr who, in extending these observations to legal settings, identified two varieties of storytelling logic used by pro se litigants in small claims court and reported on their respective success.[344] Litigants who used "rule-oriented" logic, corre-

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the dominant legal system. *Id.* at 21-32. Mrs. G., however, departs from the lawyer's script and reasserts her own meaning during her testimony at her AFDC hearing. *Id.* at 46-48. By reanimating the legal categories with her own experience, Mrs. G. critiques the systemic disregard of her point of view and affirms her dignity and equality. *Id.* at 48-51. At least this is one likely interpretation of the story as supplied by White. *Id.*

340. This is one of the interpretations of Cunningham's "Case of the Silenced Client." Cunningham, *supra* note 314, at 2463-65. It is also an interpretation of his "Case of the Silenced Lawyer," with the difference between the stories resting in the latter client's refusal to permit the lawyers to represent him in this fashion. *Id.* at 2465-69.

341. *See generally* White, *supra* note 107, at 14 n.48 (sources cited). My cursory two-paragraph discussion of pertinent works from these disciplines condenses information supplied by White, *supra* note 107, at 14-19.

342. *See, e.g.*, R. LAKOFF, LANGUAGE AND WOMEN'S PLACE 70-71 (1975). For responses to Lakoff's work, see White, *supra* note 107, at 15-16 nn.57-60. For works considering speech strategies across categories other than gender, see, e.g., Nichols, *Linguistic Options and Choices for Black Women in the Rural South*, in LANGUAGE, GENDER AND SOCIETY 54 (1983); LANGUAGE AND POWER (C. Kramarae, M. Schulz & W. O'Barr eds. 1984), *cited in* White, *supra* note 107, at 16 n.60.

343. White, *supra* note 107, at 14-15.

344. Conley & O'Barr, *Rules versus Relationships in Small Claims Dis-*

sponding to the structural elements of legal claims, fared better in court than those who used "relational" logic, organizing the story around the details of the relationships between the litigants.[345] This research suggests that listeners from dominant groups find the authoritative speaking style and rule-oriented coding more trustworthy than the deferential speaking style and relational coding characteristic of subordinated speakers.[346] Norms of competency and credibility based on dominant rhetorical styles serve to further disadvantage those already disadvantaged.

Unless student attorneys become conscious of such cultural patterns and self-conscious about their reactions to client stories, they may mistrust even their client's truthful narratives, when the storytelling conflicts with dominant narrative conventions.[347] If the attorney, through active questioning, imposes these conventions on the client's initial telling of the story, genuine meanings of the underlying events may never come to light.[348] If the attorney quickly rejects or reshapes the

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putes, in CONFLICT TALK (A. Grimshaw ed. 1989), *cited in* White, *supra* note 107, at 17 n.65.

345. Conley & O'Barr, *supra* note 344, at 2-3, 29-30.

346. *See* O'Barr & Atkins, *"Women's Language" or "Powerless Language?,"* in WOMEN AND LANGUAGE IN LITERATURE AND SOCIETY 93, 102-03 (1980), *cited in* White, *supra* note 107, at 16 n.63; *see also* Lind & O'Barr, *The Social Significance of Speech in the Courtroom*, in LANGUAGE AND SOCIAL PSYCHOLOGY (1979); Conley, O'Barr & Lind, *The Power of Language: Presentational Style in the Courtroom*, 1978 DUKE L.J. 1375; Erickson, Lind, Johnson & O'Barr, *Speech Style and Impression Formation in a Court Setting: The Effects of "Powerful" and "Powerless" Speech*, 14 J. EXPERIMENTAL SOC. PSYCHOLOGY 266 (1978).

347. *See* Bennett & Feldman, *supra* note 338, at 171, indicating that:

> The inability to produce a conventional story would leave individuals vulnerable to having truthful accounts of their actions rejected. Second, even the construction of a coherent story may not guarantee a just outcome if the teller and the audience do not share the norms, experiences, and assumptions necessary to draw connections among story elements.

Id.

348. *See supra* notes 339-40 and accompanying text. Reevaluating in this context one of the standard texts of the clinical education movement — Binder and Price's *Legal Interviewing and Counseling* — raises provocative questions. D. BINDER & S. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1979). For example, Binder and Price advise student-lawyers to seek a chronological overview of past events from each of their clients during an initial interview. *Id.* at 53-54, 72-85. What effect can following this advice have on the emergence of the underlying story of a subordinated speaker inclined toward relational logic? Can the lawyer's imposition of a chronology during the initial interview cause important information about the relationships of various actors in the story to be irretrievably lost?

original version of the narrative, she forecloses many options that may have helped her to educate legal decisionmakers about the life of the person whom they judge — an education that may have influenced their ultimate decision.[349]

If the attorney behaves in this fashion, the decisionmaker may adjudicate the case in a manner that bears little relationship to the client's understanding of what are the important features of the story and what is a fair response to the story.[350] No matter the outcome, a lawyer abandons a client by unilaterally and unreflectively enforcing, from a particular bias, a distorted reconstruction of events.[351] Although casting events in a

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Can this dominant interviewing approach hinder the development of a candid attorney-client relationship? Does it help explain why some clients become withdrawn or experience discomfort with their attorneys? Can it undermine the client's esteem in the attorney-client relationship? Does it feel like a distortion of the story to some of the storytellers?

349. *See* Minow & Spelman, *supra* note 129, stating that:

> Converting the perspectives of the parties into the established lines of arguments within the court hardly addresses the consequences of the decisions in the lives of those parties. Learning to grasp the self-understandings of the parties is part of the task of understanding their legal situation. . . . Advocates before the court can help by trying to imbue the briefs and oral arguments with narratives of the parties' experiences, perspectives, needs, and hopes.

Id. at 52-53 (footnote omitted).

350. *See, e.g.*, Cunningham's "Case of the Silenced Lawyer," in which the client, a federal prisoner, understood his case as a challenge to the constitutionality of the entire prison disciplinary system, whereas the clinic attorneys understood the case as a more narrow claim that due process notice requirements had not been followed in this instance. Cunningham, *supra* note 314, at 2465-69.

351. *See, e.g.*, Hosticka, *We Don't Care What Happened, We Only Care About What Is Going to Happen: Lawyer-Client Negotiations of Reality*, 26 SOCIAL PROBS. 599 (1979), stating that:

> "[W]hat happened" is not immutably fixed in an objective reality, but is a social construction based on experience and interaction. . . . [T]he primary issue may not be what happened to the client, nor what kind of trouble the client is in, but who has the power to say what happened and to define the kind of trouble. . . .
>
> This control over the interaction is reflected in the official definition of reality that results from the interaction. . . . [P]ower is exercised *through* the definition of reality.

Id. at 599-600 (footnotes omitted) (emphasis in original).

Kim Scheppele has indicated that although stories, including legal stories, have no natural beginning or ending, law confines these stories narrowly and thereby distorts their meaning, a process working to the particular disadvantage of "outsiders." Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073 (1989). In Scheppele's words:

> The claims of outsiders are often not heard in law because the experiences and reactions and beliefs and values that outsiders bring to the law are not easily processed in the traditional structures of legal narratives. Drawing the boundaries of legal stories closely around the

partial light sometimes represents a viable strategy, it qualifies as such only if both attorney and client consciously choose it after comparison with alternative strategies. Therefore, a feminist clinical program would include the study of cross-cultural communication and experiment with methods of building communication bridges.

The narrative and consciousness-raising methods endorsed by feminists, when applied to attorney-client interactions, yield a different image than that of the self-appointed reality-defining attorney described above. Student attorneys would intervene as little as possible in their clients' initial narrations, encouraging clients to tell comprehensive stories as they view them. After hearing a complete narration, the attorney would explore the story to develop a fuller description of the client's understanding and interpretation of the experiences that she recounted. The student attorney also might elicit further background information about the client's life to help her comprehend the meaning of the story. When well into the narrative process, the attorney might test her evolving understanding of the story by reporting it to the client for validation and modification.

Through this process, the student attorney becomes a supportive and respectful learner and the client a teacher of her life.[352] Attorneys faithful to this process take seriously the ob-

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particular event at issue may exclude much of the evidence that outsiders may find necessary to explain their points of view. But standards of legal relevance, appearing to limit the gathering of evidence neutrally to just "what happened" at the time of "the trouble," may have the effect of excluding the key materials of outsiders' stories. And this apparently harmless legal habit has effects that are not at all harmless.

Id. at 2097; *cf.* Spelman, *supra* note 194, at 151 ("Treating persons as the persons they are is trying to see them as they see themselves.").

352. I am not suggesting that attorneys should design this process to work in the opposite direction as well. Involvement in their own consciousness-raising should not be the substitute fee for legal services extracted from indigent clients. *Cf.* Joselson & Kaye, *Pro Se Divorce: A Strategy for Empowering Women*, 1 LAW & INEQUALITY 239 (1983) (developing a client consciousness-raising approach to representing women in divorce proceedings). On the other hand, I would not foreclose a reciprocal consciousness-raising project should it be chosen by clients. Nor am I precluding the possibility that a lawyer's assistance in developing legal claims from a client's concerns might have consciousness-raising consequences for the client. For example, it might be powerfully transformative for a woman who has suffered her employer's repeated sexual advances to come to understand that she has a legally recognized cause of action for sexual harassment. *See* C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979) (laying the groundwork for subsequent legal recognition of sexual harassment as a cause-of-action).

ligation to try to understand the world from another's perspective. The attorney seeks to create conditions that facilitate the emergence of the client's story, an effort requiring a realistic awareness of the barriers to success.[353] The model for the attorney-client interaction is that of conversation, no less authentic for its instrumental quality.[354] In keeping with feminist sensitivity to the politics of interpersonal dynamics,[355] this model seeks to mitigate, although it surely cannot eliminate, the distorting effects of power imbalance in the attorney-client relationship.[356]

Feminists also would seek to reduce the distorting effects of institutional processes on the events underlying adjudication.[357] Following an extended exploration of the client's story, feminists would have clinic students undertake with their clients a process of contextual reasoning. Starting from mutual reflection on the client's lived experiences, attorney and client would develop even more context. They would inquire about other perspectives on the original account. What are the stories of other participants in the process? How do they intersect with the client's story? How do their stories affect the client's story?

After reconsidering, perhaps reconstructing, the initial story through contemplation of the contribution from other potential versions, student and client would explore forms and strategies available within the legal process for relating the story so that other participants in the process might come to understand it.[358] They would pay particular attention to strate-

353. *See supra* notes 346-47 and accompanying text.

354. *See supra* notes 191-92 and accompanying text.

355. *See* Bellow, *supra* note 257, at 621 ("One of the most important insights of feminism is the degree to which it recognizes that . . . the way we treat each other expresses and, in fact, creates our political reality.").

356. *See* Wasserstrom, *supra* note 254, at 1 (suggesting the possibility that the typical paternalistic treatment of clients by lawyers is inherent in the relationship, and therefore inevitable).

357. Cunningham explains that distortion is inevitable in that legal institutions operate through language: "Like more familiar forms of language, law creates knowledge by dividing up the spectrum of human experience into new basic categories. But this new knowledge, like all forms of knowledge, involves a loss, a reduction of the particularity of experience and the perspectives of other understandings." Cunningham, *supra* note 314, at 2491 (footnote omitted). But this distortion is unnecessarily increased by the stylized language of legal opinions that impedes connections between the judge and litigants (or others). *See* Minow & Spelman, *supra* note 129, at 76 ("The judicial opinion is too partial and too formal to provide stories that elicit and express humanity.").

358. This process resembles Cunningham's prescription for lawyering as

gies for reaching the hearts and minds of those with decisionmaking authority. These strategies would include contextualization joined with the formulation of interpretations of law that would be both persuasive as legal reasoning and responsive to the client's needs and interests.[359] Presenting the case in a contextualized but legally recognizable fashion would enable decisionmakers to respond to the client as a real person rather than as a stereotypical legal abstraction.[360] Such a contextualized presentation also might enable decisionmakers to recognize the partiality of their own perspectives, to reflect on the limitations this partiality creates, and to realize how differently the world can look and feel to others.[361]

In other words, when student and client develop a contextualized presentation of the client's participation in events, rather than an oversimplified version that avoids the complexity and nuance of real life, they enable clients to retain and convey their personhood, and therefore their dignity, before lawyer, judge, and all others involved in the legal process.[362] And when judges and other decisionmakers appreciate the personhood of those on whom they pass judgment, they reach better decisions, for they can locate these persons in their authentic situations, rather than see them as decontextualized cartoons.[363]

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translation, such that "the lawyer engages both the client and the law-speaking other party in dialogue that enables each to expand what they know so as to meet on common ground." Cunningham, *supra* note 314, at 2491.

359. For a creative strategy of this type, see Brief Amicus Curiae, National Abortion Rights Action League, et. al., Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (providing narratives by men and women about the profound influence of abortion rights in their lives).

360. *See* Minow, *supra* note 40, at 89 ("Besides seeking out unfamiliar perspectives and analogies new to the law, all judges should also consider the human consequences of their decisions . . . rather than insulating themselves in abstractions.").

361. *See* Minow & Spelman, *supra* note 129, at 52 ("Increasing the self-consciousness of the judge in the act of judgment may . . . enlarge the judge's ability to understand other human beings.").

362. It is intriguing to consider how a lawyer behaving according to these premises might have interacted with Mrs. G. and how the lawyer might have facilitated the self-defining, dignified testimony that Mrs. G. ultimately improvised at the hearing, perhaps helping to shape it further to enhance the likelihood of its being heard. If the lawyer had encouraged full discussion of a broad range of options for this testimony, Mrs. G. might also have made other choices regarding her self-presentation at the hearing. *See* White, *supra* note 107.

363. What a system of justice by computer would lack is not reason, but understanding: while it can calculate and produce predictable de-

Clinical programs that represent socially subordinated persons provide a forum for epistemological inquiry into the implications of personal and institutional awareness of the multiplicity of experiences and backgrounds from which knowledge emerges. To feminist thinkers, this feature of clinical programs also provides an opportunity for empathy. Not only might students develop empathy, but students and clients might experiment together with ways to evoke empathy within legal bureaucracies.[364] Because many competing views and interests converge in a legal conflict, empathy will guarantee neither a client victory nor a change in the underlying conditions that precipitate the legal predicaments of the subordinated. Nevertheless, empathy can nourish a more informed decisionmaking process that is mindful of its consequences.[365]

In sum, a feminist clinical program would seek to remake, and study its remaking of, the attorney-client relationship. In such a program, the student lawyer would not view the client as dominant norms typically construct her — as a person who rarely acts but is primarily acted upon, an object of the clinical program and the legal process. Rather, the client, in conjunction with the student-lawyer, has an opportunity to engage in shaping the case and in interpreting its meaning. Remaking the attorney-client relationship then creates further prospects for remaking the legal processes that follow. Through their participation in cases guided by feminist-clinical precepts, students uncover extensive material for analyzing the existing opportunities for, and obstacles to, remaking legal processes in this fashion.

The combination of feminist and clinical methods marks a

> cisions, given certain laws and provided particular facts, it cannot consider how such decisions will affect individual people nor may it reconsider its initial judgment in light of such actual or unanticipated effects. In the justice-by-computer fantasy we have just rehearsed, people cannot be treated with dignity or respect, for there are no human agents around who could so treat them.

Minow & Spelman, *supra* note 129, at 42.

364. Feminists recognize the difficulty of this task, since bureaucracies operate by impersonal standards aimed at achieving efficiency and control. *See* Elshtain, *supra* note 57; Ferguson, *supra* note 41. But bureaucracies are enforced by bureaucrats who are, at bottom, human, and who therefore have empathetic capacities to which litigants can appeal.

365. *See* Minow & Spelman, *supra* note 129, at 71-72 ("We do see things differently if we look through an opposing perspective. But this sense of a different perspective does not mean conceding away a sense of right and wrong, or better and worse.").

route to effective and ethical lawyering that coincides with effective and ethical living. Accordingly, a feminist-clinical blend challenges the polarity of not just the theoretical and the practical, but the personal and the professional.[366] The joining of feminist and clinical methods renders personal ethics and professional ethics inseparable.[367]

B. WHAT CLINICAL EDUCATION ADDS TO FEMINISM

Feminists grapple with the value of litigation for women.[368] Some question whether legal categories, which they see as constituted of and constituting patriarchy, can serve women's interests in the long run. They contend that law embodies the experiences of its makers, primarily privileged men, and hides its particularity by divorcing its categories from their contexts via abstract rules and principles.[369] One committed to this view is unlikely to invest heavily in legal processes, for she would view the processes themselves as skewing the problems confronted and the objectives desired. She would be inclined to find more direct methods of addressing women's needs, methods that offer greater hope of achievement.

Yet even if women chose to evade law, law would not evade them.[370] Given the pervasive presence of law in all of

366. Finley writes that "men have been able, thanks to women, to organize their lives in a way that enables them not to have to see such things as work and family as mutually defining." Finley, *supra* note 125, at 894. Menkel-Meadow asserts that nearly all reports by women lawyers discuss the interrelation of their personal and professional lives, whereas the ethnographies of male lawyers do not generally raise this discussion. *See* Menkel-Meadow, *Women in Law?: A Review of Cynthia Fuchs Epstein's* Women in Law, 1983 AM. B. FOUND. RES. J. 189, 195.

367. This is one response to the vexing question of role morality that plagues philosophers of law. *See* Luban, *supra* note 244, at 656; Wasserstrom, *supra* note 254. The question, according to Luban, is whether occupying a social role can exempt one from otherwise applicable moral obligations. *Id.* at 659. A feminist clinic would merge, and examine the merger, of personal and professional norms, since humans can never separate themselves from the roles they find themselves occupying.

368. For a taste of the flavor of these debates, see Burns, *Notes From the Field: A Reply to Professor Colker*, 13 HARV. WOMEN'S L.J. 189 (1990); Colker, *Feminist Litigation: An Oxymoron? — A Study of the Briefs Filed in* William L. Webster v. Reproductive Health Services, 13 HARV. WOMEN'S L.J. 137 (1990); Colker, *A Reply to Sarah Burns*, 13 HARV. WOMEN'S L.J. 207 (1990). This debate is rooted in the dilemma of choosing strategies that might be effective in the current system, but which reinforce systemic norms to which feminists object. *See* Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1849-52 (1987).

369. *See generally* Finley, *supra* note 125, at 892-906.

370. *See* C. MACKINNON, *supra* note 41, at xiii ("This book . . . recognizes

our lives, the stance of many feminists, particularly those involved in feminist jurisprudence, has been to reflectively engage legal reasoning and legal processes, to discover the vantage point from which law speaks, to reveal the exclusion of a diversity of experiences from this vantage point, and to work toward law's inclusion of broader perspectives in the interests of a more open, equal, and just society.[371] Toward this end, feminist lawyers seek legal recognition of women's equality and autonomy in all spheres of life, while simultaneously examining and debating the shape and scope of these concepts and the value of legal modes of achieving them.[372] Here again, feminist theoretical work guides its practical work and vice versa, shaping and shedding light on feminist debates about the utility of law reform.

Clinical education seems an auspicious but rarely acknowledged vehicle for grounding this examination of the promises and limits of law. Feminist lawyers and feminist law professors are often different persons, and the quality of their interaction may directly affect the development and dissemination of feminist legal thought.[373] By dissolving the distinctions between lawyer and professor, clinical programs span potential gaps between these roles. The programs are structured to involve both regular engagement in legal processes and intensive reflection on the nature and efficacy of these processes.[374] This feedback cycle between act and thought in law school clinics parallels the intellectual approach of feminism.[375]

The clinical methods of learning about law and society from experience, synthesis, critique, and responsibility in a collaborative setting might anchor the research agenda of feminist

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the power of the state and the consciousness-and-legitimacy conferring power of law as political realities that women ignore at their peril.").

371. *See, e.g.*, Bartlett, *supra* note 95; Minow, *supra* note 40 (examples of feminists' efforts to promote change within the existing legal framework).

372. *See, e.g.*, Finley, *supra* note 125, at 908 ("In engaging the law over the meaning of women's experiences, people representing women must remain constantly critically aware of the dilemma of legal language, of its simultaneous power and limitations.").

373. I do not mean to imply that lawyers do not contribute to the development of legal thought, or that professors do not contribute to legal practice. I mean simply that some persons engage in lawyering as their primary occupational identity, and others engage in teaching and writing about law and lawyering as their primary occupational identity. This results in a difference between the two groups in their day-to-day lifestyle and focus of attention, although there is obviously overlap and interplay between these groups.

374. *See supra* notes 204-24 and accompanying text.

375. *See supra* notes 197-98 and accompanying text.

legal thinkers. Feminists could recycle into further uses the insights acquired by collectively reflecting on their experience of using law, and further uses would nourish greater insight. Absent regular participation in a group forum for engaging and evaluating legal processes, feminists miss a rich source of experiential data. Such data is vital to feminist-style theorizing and bears closely on questions that feminists have raised and on answers which they seek.

Some feminists have joined other thinkers in critiquing the premises of the adversary process. Using Carol Gilligan's typology, they note the relationship of the adversary process to Jake's problem-solving approach and its divergence from Amy's method.[376] In other words, feminists see the adversary process as expressing the values of a problem-solving style more predominant today among men than women. To these critics, adversariness appears to have a gendered quality, and some are attempting to reimagine the process from Amy's point of view with hopes of weaving this view into the prevailing system.[377] Feminists involved in this project would benefit considerably from the clinic's regular exposure to law, lawyering, and legal processes from which they might collectively construct and consider alternative models.

The data that clinics can offer feminists come from exposure to more than just the legal system itself. Data also emerges from the stories of the people who walk through the clinic's doors. The conditions of poverty and its concomitant problems underlie the typical clinic caseload. The clients stand on the lowest rungs of many social hierarchies and represent perspectives disparate from those of many feminist legal thinkers. The opportunity to work with people of such diverse backgrounds and to test and refine feminist theories to account for the infusion of their narratives and perspectives is invaluable to theorists who seek to push the limits of what they know.[378] Moreover, a clinic provides an opportunity to consider various approaches to ameliorating conditions of inequality, while engaged in a project aimed, in part, at this objective. Clearly, feminist legal thinkers would effectively meld action and inquiry, the foundation of their methods, if they took part in clinical

376. *See* Menkel-Meadow, *supra* note 89, at 50-51.

377. *See* Karst, *supra* note 89; Menkel-Meadow, *supra* note 89; Spiegelman, *supra* note 338.

378. *See supra* note 187.

legal education.[379]

As stated earlier, feminists working in clinics would attend to the power dynamics of the attorney-client relationship and seek to negotiate with their clients a less hierarchical, and hence more humane, interaction.[380] Aware of the pitfalls of unilaterally reconceiving the attorney-client relationship,[381] feminist clinicians and students would hope to create mutually with their clients a form for relating and would discuss and appraise with them its evolution. Feminists also would collaborate with their clients to find the best means of conducting cases and together discuss and appraise their progress. This work might fuel desperately needed insight into the nature and difficulties of cross-cultural collaboration, and into the process for developing such collaboration without turning clients into objects of study.

Paradoxically, both the powerful promise and the potential pitfall of feminist theory lie in its already having achieved a certain degree of conceptual sophistication. Many of feminism's conceptual breakthroughs, once grounded in a shared understanding of concrete phenomena, are defined and debated in law review articles and classroom seminars in a manner that has become detached from experiential underpinnings.[382] Having achieved the status of abstraction, these concepts are ap-

379. Some critical theorists have advocated support for clinical legal education. *See, e.g.*, Kelman, *Trashing*, 36 STAN. L. REV. 293, 300 (1984); Klare, *The Law-School Curriculum in the 1980s: What's Left?*, 32 J. LEGAL EDUC. 336, 343 (1982). Although the methodological compatibility of feminism and clinical education suggests that many feminists would support clinical education if asked, feminists have not articulated or developed the reasons for this support in explicit terms.

380. *See supra* note 354 and accompanying text.

381. *See, e.g.*, Condlin, *supra* note 65, at 55 n.31 (Condlin asks, "How is it possible . . . even to describe a nonhierarchical relationship from the perspective of only one person . . . particularly the person already dominant.").

382. My Article stands in that paradoxical position, endorsing experience-grounded theory while not always exemplifying it in my discussion. Although the ideas that I recount are rooted in the experiences of many people, and my attachment to these ideas grows out of my own experiences, I have not provided many of the pieces of this context. Pleading the conventions of law review discourse is inadequate. The choice to provide a sweeping synthesis of the theory of practice and the practice of theory in two broad-based movements, and to draw lessons from their interaction, created a project of a scope that seemed to require the limiting of experiential descriptions. Hopefully, the conceptual material is expressed clearly enough that readers can draw from their own experiences and imagine how spaces between the lines might be filled. I hope further that this Article is just the beginning of a conversation and that future work will bring experiential insights directly to bear on these sets of ideas.

plied from above to other concrete phenomena. When applied appropriately so that further ground-up observations supply the data for theoretical refinement, this process is a search for verification and a source of insight. The deductive search for verification is a vital phase of the theory-practice spiral, as long as the alternate direction of movement precedes and follows it. The danger that threatens the epistemological integrity[383] of feminist theory is that the theoretician's attachment to abstract developments will change the search for their verification into a need for their verification, blinding observation of ill-fitting data that, if incorporated, could redirect and improve conceptual understanding.[384]

Participation in clinical education would help keep feminist legal theorists true to their epistemological moorings. Through involvement with a diverse array of people in a diverse array of situations in which the problems of the world have intersected with law, feminists would find the constant source of refueling and rejuvenation that their project requires, while seeking to relieve suffering in the process. Although many feminists find other settings in which to accomplish these goals, they should not overlook the law school's clinic as one of the fertile grounds in which to do feminist theoretical and practical work. The strength of clinical education on which feminists can rely is its maintenance of the inductive phase of the theory-practice spiral in top working condition.

C. ENRICHING THE TRADITIONAL LAW SCHOOL CLASSROOM

Those who malign lawyers' character and competence turn to law schools to help solve both problems.[385] By exposing students to law as it operates through people, processes, and institutions, and by promoting practices of critical reflection, law schools can do something about lawyer's competence and perhaps even more about lawyer's character. By supporting and

383. The term is Marjorie McDiarmid's. *See* McDiarmid, *What's Going on Down There in the Basement: In-house Clinics Expand their Beachhead*, 35 N.Y.L. SCH. L. REV. 239, 287 (1990).

384. *See, e.g.*, C. GILLIGAN, *supra* note 30, at 24 (describing how "theory can blind observation").

385. *See, e.g.*, Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 240-41 (1973) (competence); Thomforde, *Public Opinion of the Legal Profession: A Necessary Response by the Bar and the Law School*, 41 TENN. L. REV. 503, 503-05 (1974) (character); Wasserstrom, *supra* note 254, at 15-24 (same).

taking seriously both clinical and feminist methods, as this Article describes them, law schools would cultivate habits of attention to matters of ethical consequence and improve the moral training of lawyers.

Taking clinical and feminist methods seriously might cause the proliferation of a few, or a few more, courses in clinical education and feminist jurisprudence in the law school curriculum. To my mind, this would be an eminently desirable result. Another way for legal education to take these movements seriously is to import the lessons of both methodologies into the traditional classroom.[386]

If teaching doctrine is the aim of traditional education, then teaching "doctrine in a vacuum" frustrates that aim.[387] Legal rules and principles grow out of historical, social, cultural, and ethical contexts. For students to understand fundamentally and work creatively with rules and principles, they must appreciate the contexts from which these rules and principles emerged.[388] Adopting the clinical and feminist emphasis on the development of context as a prelude to understanding would enrich the traditional classroom environment.

One way to develop more context for legal rules and principles is to diversify the learning materials of the law school classroom. Feminists and clinicians would urge classroom elaboration of the stories of the persons who become the textbooks' cases, whether through visits to the class of persons involved in litigation,[389] examination of story-illuminating materials such as case histories, transcripts, and pleadings,[390] or imaginative

386. Karl Klare's enumeration of the absences in the traditional law school curriculum reads as a prescription for the clinical and feminist methods described here:

> What is left out of the law-school curriculum? Omitted is systematic training in how to learn from others; in how to criticize one's own work and the work of others; in how to learn about lawyering *from* practice, that is, in how to acquire the capacity for continuing self-development over the span of a career; and in how one might act in the central relationships that constitute the lawyering process: adversary, client, coworker relationships, and so on. Omitted also is systematic training in how to work closely and cooperatively with others in situations of high vulnerability and high risk and, finally, in how to think critically about morals and politics based on the best learning available from the social sciences and from ethical discourse.

Klare, *supra* note 379, at 341 (emphasis in original).

387. *See* White, *supra* note 14.

388. *See* Klare, *supra* note 379, at 343.

389. *See* Menkel-Meadow, *supra* note 233, at 297 (describing the lessons learned about a case from a plaintiff's classroom visit).

390. *See, e.g.*, Munger, *Clinical Legal Education: The Case Against Separa-*

role-playing by students based on historical materials.[391] Students could then probe these materials to ascertain whether they included the positions of all interested persons and communities and, if not, seek to remedy the exclusions.

Use of interdisciplinary tools, as advocated by feminists and clinical educators, would inform students' thinking beyond the concrete history of the case itself. With interdisciplinary assistance, a student could consider a number of important questions: What were the structural forces — historical, social, and cultural — alive in the era and region in which the case was born? What were the patterns of social conflict and conditions of social distress that may have affected its birth? How did the conduct and outcome of the case affect these conditions? How can professionals and institutions respond to the individual and social problems that they encounter?

With this broad and deep contextual background, feminists and clinicians would require students to reason from the concrete reality of the cases to principled conclusions. Feminists, in particular, would have students consider the reasoning advanced and the conclusions desired by the full array of interested persons before making any decisions, encouraging students to rethink doctrine from a variety of vantage points. Students then would compare their decisions and decisionmaking processes to the actual reasoning and judgment in the case. In doing so, they would have to reflect on questions of fairness and justice. Was the decision and the process of decision in this case just? From whose perspectives? Can I defend my decision and my process of decision? Can I critique them? What is my defense or critique of the court's reasoning and holding?

Cross-disciplinary attention to the tools of the humanities, particularly literature and philosophy, would help students

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tism, 29 CLEV. ST. L. REV. 715, 729 (1980) (urging the use of supplementary documents in a "standard casebook course"); *see also* J. NOONAN, PERSONS AND MASKS OF THE LAW (1976) (providing case histories of the persons and problems underlying well-known cases); IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY (R. Mnookin ed. 1985) (offering case studies of five landmark Supreme Court cases affecting children's interests).

391. Kohlberg has described the value of "reciprocal role playing," taking the roles of persons with a variety of perspectives, in facilitating moral development. *See* Richards, *supra* note 263, at 372 ("To the extent clinics and simulation techniques promote reciprocal role playing, they have, in addition to their pedagogical rationale in improving skills training, a further justification in facilitating moral development through stimulating the capacity of students to take different points of view.").

think critically about these questions of justice, fairness, and truth. Wrestling with their internal conflicts concerning ethical processes and outcomes, an active experience on which students must reflect intensively, can help students develop the cognitive and affective capacities of moral judgment needed to resolve their conflicts.[392] In this way, students, guided by whatever tools are available, confront and articulate the inchoate philosophies by which they live and make choices.[393] By doing so, they come to understand themselves and others and can begin to develop a conscious process of moral reasoning.

Feminists and clinicians might recommend use of *Antigone*, for example, in a law school classroom to help students consider the relationship between law and morality, a relationship not easily discussed in the abstract. The instructor might divide the students into groups, one group assigned to prosecute, another to defend, and a third to pass judgment on Antigone for allegedly violating the law. Alternatively, every student could rotate through each of these roles. In struggling with the discomfort that arises from considering their personal and professional responsibilities while standing in each of these positions, students would have to engage their intellectual and emotional resources to make decisions about how to behave and to articulate reasons that justify their decisions. Coming to grips with this demanding process would involve coming to grasp the nature and complexity of moral judgment in a vivid, immediate, and personal way. It would develop students' appreciation of the interweaving of legal and moral reasoning and the way in which legal frameworks can capture or distort the underlying ethical, political, and social problems from which they grow.

To elicit data that might inform their behavioral choices, students could simulate interviews with Antigone, Creon, and other witnesses — Ismene, for example. Through participation in these interviews, students would develop a variety of perspectives on law and morality and imagine themselves inside these perspectives. The instructors might ask the class to draft jury instructions on the appropriate standards for adjudicating Antigone's "guilt" or "innocence," and to reflect on the ambiguous meanings of these terms when considered in this context. The students might consider which of the many significant events in the years preceding Antigone's alleged violation of

392. *See supra* note 261 and accompanying text.
393. *See supra* notes 237-38 and accompanying text.

law a judge would find relevant or persuasive in deciding her fate. In analyzing why particular background details might or might not be relevant, or how information that each of the interviewees provided might affect their judgments, the students would be collaboratively inquiring into, and gradually closing in on, perspectives on the complex relationship of law and legal actors to circumstances of human moral conflict. Observing themselves throughout this process would help students to understand themselves as lawyers and as human beings who are concerned about fairness and the responsibilities of living in interrelationship with others.

The feminist and clinical movements view the nature of justice and community as the stakes of education, a sensibility that the classroom can actively tap.[394] To stimulate this sensibility, feminists and clinicians would reduce the traditional hierarchy of the classroom. A teacher wedded to this aim would not be the omniscient fount of knowledge, but would facilitate the students' active responsibility for making sense of their experience of the legal and interdisciplinary materials. Authoritarianism conflicts with the values of this project and impedes its possibilities of success. An atmosphere of open exploration, where students and teachers exchange their views and insights on matters of deep and abiding interest, encourages students to assume responsibility for developing the understanding of self and others that this classroom approach requires.[395]

If legal education followed this methodological course, it would come to resemble feminist and clinical methodologies in yet another manner. The classroom would employ particular intellectual practices, and insight would flow from participation in these practices.[396] These practices involve relating to diverse texts and materials in a way that brings one's own and others' perspectives into view, and critically reflecting on these perspectives in light of such materials. The experience of the classroom method would constitute the source of insight, and the experience of further classes and materials would test and

394. *See supra* notes 300-07 and accompanying text.

395. Kohlberg's emphasis on "educational democracy" as an important precondition for moral education supports this insight. *See* Richards, *supra* note 263, at 372.

396. *See* White, *supra* note 14, at 161 ("[C]an we come to see that the law that we teach . . . is not a set of rules to be learned but a set of ways of thinking and talking and acting together about questions of justice, a method and a community which it should be our task to exemplify and constitute?").

develop these insights.[397] This classroom methodology links theory and practice in the spiral that inspires feminism and clinical education. Plainly, the lessons of these movements can enlighten legal education generally.

D. REEXAMINING ETHICS

The methodologies of the feminist and clinical education movements suggest that the story of *Antigone*, a case in a law school clinic, or other richly specified narratives represent promising springboards for inquiry into broad questions about law and morality. The considerable and sundry details of such narratives express the subtleties and complexities of the morally charged situations in which humans find themselves. Unlike many children's tales, a single lesson does not surface readily from these narratives. Rarely do these real-life or life-like contexts provide easily grasped answers to obvious questions. Rather, they suggest multiple interpretations and analyses. The narratives contain painstaking renderings of competing viewpoints that check our natural tendencies to oversimplify and overlook details and perspectives that unsettle the neat conclusions that we desire. We must actively engage the full breadth and depth of these narratives to honestly and effectively further our analysis. What we will come to know as a result of this inquiry will be altered by the contextualized process through which we have come to know it.

I have sought to demonstrate that such a theory-building

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397. James Boyd White's vision of legal education supports the vision developed in this Article:

> The heart of this education is learning to be responsible in a new way for what one thinks and says. The student has to make sense of it all herself, for no one can do it for her. She has to think for herself in circumstances forever new, to reach conclusions for which she is responsible, to decide for herself what is worth saying and what is not. This constitutes an active education, a learning-to-do, not a passive acquisition of knowledge; when it works well, it tests the limits of one's mind and the imagination. . . . What one learns in law school is not law in the sense of repeatable propositions, but how to learn law — that is, how to do it and how to make it. In an important sense "the law" one studies is thus the law that is actually made in the classroom, made out of the materials of case and statute as the class thinks and talks about particular questions. A good law school is thus a school of law-making. This means that the proper focus of attention is not on what the student is learning to repeat or to describe but what she is learning to see and to do; on the doctrine or language of the law not abstracted from experience, but embedded in it, as the object and medium of thought, expression and intellectual action.

Id. at 157, 162.

practice is a distinctly ethical project.[398] Clinical and feminist methods represent possibilities for rescuing the morally significant details that are systematically excluded from the culture's storehouse of standard stories. Acute empirical sensitivity — foregrounding the stories of those whom cultural structures have generally relegated to the background, and supporting the voices often rendered barely audible — can help to accomplish this goal. Working through the cognitive dissonance created by the infusion of these previously neglected perspectives expands our understanding and promotes both a critique of the societal structures that obscured such knowledge and an interest in dismantling these knowledge-distorting structures.[399] This is why Abraham Heschel would have prophets take philosophers to the slums.[400] From the feminist-clinician-prophet-philosopher's vantage point, the distinction between epistemology and ethics collapses.

From feminists' and clinicians' relentless demand for elaborate concrete detail and for special attention to the data provided by those whom society frequently disempowers comes a reconceived notion of what qualifies as ethical inquiry. This notion of ethical inquiry is a process grounded in our experiences of social and institutional interactions and concerned with the way people actually respond to the moral choices presented by everyday life and work. The focus of ethical theory is no longer the justification of actions affecting the "generalized others" of traditional philosophy, but the justification of actions affecting the "concrete others" with whom we are enmeshed.[401] Ethical systems emerge from this network of relationships when we

398. *See supra* notes 188-89, 263-84, 317-21 and accompanying text.

399. *See* Minow & Spelman, *supra* note 318, stating that:

> Because persistent patterns of power, based on lines of gender, racial, class, and age differences, have remained resilient and at the same time elusive under traditional political and legal ideas, arguments for looking to context carry critical power. In this context, arguments for context highlight these patterns as worthy of attention and, at times, condemnation.

Id. at 1651.

400. *See* Heschel, *supra* note 199 and accompanying text. This is also why Cornel West advocates a philosophy of "prophetic pragmatism," which through the examination of actual human lives and the acknowledgement of the constraints on, and possibilities for, moral improvement, calls for cultural challenges to oppressive structures of power. West, *supra* note 325, at 228-34; *see also* Minow & Spelman, *supra* note 318, at 1612-15 (discussing this piece of West's work).

401. *See* Benhabib, *The Generalized and The Concrete Other: The Kohlberg-Gilligan Controversy and Moral Theory*, in MORAL THEORY, *supra* note 91, at 154.

seek to resolve and explain our resolutions of the quotidian dilemmas that we encounter in the complex, nuanced, temporal context in which they arise. This ethical theory, then, responds to the experiences central to daily personal situations and requires reflection on such situations to develop moral consciousness.[402]

In the hands of feminists and clinicians, ethics becomes a sustained practice of empirical attention and reflection on the actions of people in actual situations. Ordinary life expresses and creates ethical theory, which is understood as having an inescapably social character.[403] The better our context-sensitive empiricism, the better our moral deliberations, and the more precise the articulation of our ethical principles will be.[404]

CONCLUSION

As exemplified by the reading of *Antigone*, feminism and clinical education are independent movements that, in response to different conditions, have formulated reciprocally reinforcing methodologies. In this Article, I have explored the dramatic likeness between feminist methods and clinical methods, a likeness rooted in their independent efforts to foster collaborative critical inquiry into the ethical dimensions of interpersonal and institutional experiences. I have sought to enhance that likeness by considering the implications of a direct application of feminist methods to clinical education and, conversely, of clinical methods to feminist jurisprudence. Although motivated by different aims, each set of methods illuminates the relationship between theory and practice, a relationship conveyed by the image of a spiral.

The theory-practice spiral of feminist and clinical methods has profound ethical implications. Indeed the methodologies of

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402. *See* Held, *supra* note 319, at 112 ("I suggest that we ought to try to develop moral inquiries that will be as satisfactory as possible for the actual contexts in which we live and in which our experience is located. . . . We [should] do our best to 'test' various moral theories in actual contexts and in light of our actual moral experience.").

403. *See* Addelson, *Moral Passages*, in MORAL THEORY, *supra* note 91, at 87-88 ("[M]oral explanation . . . [is] constructed in social interactions, and . . . systematic social and political relations are created and maintained in the process of construction.").

404. *See* A. MACINTYRE, AFTER VIRTUE (1981) (arguing that context is necessary for understanding the significance of moral claims and decrying the loss of context for many of our important moral principles); Kittay & Meyers, *Introduction*, in MORAL THEORY, *supra* note 91, at 3, 12 ("[G]eneral moral principles cannot be applied without a subtle understanding of context.").

feminism and clinical education offer a new ethical vision, reinventing our understanding of the nature of moral theory and of the practices that constructing moral theory requires. According to this vision, moral theory embodies the inductive, narrative, contextual examination of daily personal interactions.

The lyrical chorus of *Antigone*, which comments on the unfolding events of the play, supports such an ethical vision. Martha Nussbaum, displaying a lyricism of her own, describes the model of reflection conveyed by *Antigone*'s chorus:

> Each has an internal structure and an internal set of resonances; each reflects upon the action that has preceded; each reflects upon the preceding lyrics. Already, then, we find that to interpret fully any single image or phrase requires mapping a complex web of connections, as each successive item both modifies and is modified by the imagery and dialogue that has preceded. . . . The lyrics both show us and engender in us a process of reflection and (self)-discovery that works through a persistent attention to and a (re)-interpretation of concrete words, images, incidents. We reflect on an incident not by subsuming it under a general rule, not by assimilating its features to the terms of an elegant scientific procedure, but by burrowing down into the depths of the particular, finding images and connections that will permit us to see it more truly, describe it more richly; by combining this burrowing with a horizontal drawing of connections, so that every horizontal link contributes to the depth of our view of the particular, and every new depth creates new horizontal links.[405]

Antigone's chorus captures the aspirations of feminist and clinical methods and theories. To the extent that law schools embrace feminism and clinical education, these movements promise to enliven legal education and enhance its capacity to address questions of justice, fairness, and truth. By espousing reflective practices as a source of wisdom, feminism and clinical education remake our understanding not only of the relationship between doing and knowing but between law and life as well.

405. M. NUSSBAUM, *supra* note 25, at 68-69.